

# **“Scholarly Communications at Duke” Blog**

December 2006-April 2016

By

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# Introduction

The Scholarly Communications @ Duke blog began when efforts at copyright education and scholarly communications advocacy were still relative new for many academic libraries. It grew out of a collaboration between myself, as the newly hired Scholarly Communications Officer in the Duke Libraries, and a creative colleague who was interested in how libraries might leverage some new technologies. Shortly after the blog began in 2006, the lawsuit over electronic reserves at Georgia State University, which is still going on as I write this in 2018, began to draw much greater attention to the issues around copyright, fair use and digital technology. The blog found its niche because it tapped into this burgeoning set of concerns.

Over almost ten years, this blog addressed current issues in scholarly communications, and also tried to provide information, from the most basic to complex issues, about how copyright law impacted higher education as it moved more fully into a digital age. Although many of these posts are highly topical, I believe they focus attention on issues that are important and ongoing.

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Dean of Libraries  
University of Kansas Libraries

# Managing copyright in your own work

*Tue, 26 Dec 2006 15:36:17, ksmith12@duke.edu, [category: authors-rights]*

How do I manage the copyright in my own work?

*Q — What do I have to do to get a copyright?*

You do not need to do anything to have copyright protection in your original work; since 1989, copyright has been automatic, taking affect as soon as original work is fixed in tangible form. This means that text that is written in a word processing program, photographs that are taken with a digital camera and music that is recorded on an iPod, to take just a few examples, all have immediate and automatic copyright protection.

*Q — Should I register my copyright?*

It is not necessary to register a work in order to have copyright in that work. Registration, however, has several advantages. Registration is required before a copyright holder can sue someone else for infringement, for example, and the fact of registration is considered evidence of ownership and originality. If you plan to distribute your work to the public in any way and want to protect it from unauthorized uses, registration is a good idea.

Copyright registration is easy and inexpensive (\$45). The [Copyright Office webpage](#) has all the instructions and forms that you need.

*Q — Do I have to give my copyright to a publisher?*

Not always. Academic publishers have traditionally required that authors transfer (or “assign”) their copyright to the publishers. But it is becoming more common for a publisher to accept a “non-exclusive license” to publish your work. In that case, you would retain the copyright and be able to make subsequent uses of your own work without permission.

Even when you do transfer your copyright to a publisher, it is possible to retain rights to make certain uses of your work. It is important to read publication agreements carefully and to be ready to negotiate with publishers when necessary.

*Q — If my publication agreement gives the copyright to the publisher, can I still use my own work?*

Not necessarily. If you have transfer all of your rights to the publishers, putting your own work on a website or distributing copies at a scholarly conference, for example, might actually infringe the copyright, which is now owned by the publisher. This is why it is important to be careful about the publication agreement that you sign. Remember that these agreements are negotiable.

*Q — What rights should I retain when I publish a work?*

One thing many faculty want to do is to use their own work in class, even after it has been published. The right to reproduce and distribute your work for non-commercial educational purposes should be retained. Likewise the right to prepare or authorize derivative works like a new article based on previous scholarship, a collection of prior writings or a translation is valuable for scholars. Also, the right to post

your article on a personal web site or to place it in a repository maintained by your institution or disciplinary organization is becoming increasingly important. Studies indicate that open access actually increases the visibility and citation of your work, so retaining the right to provide such access can be very beneficial.

*Q — Can someone help me understand the publication agreement?*

The [Scholarly Communications Office](#) at Duke will be happy to look at your publication agreement with you. Many such agreements already permit you to retain some or all of the rights we have discussed, and if yours does not, we can suggest ways to negotiate for those rights. Please call us at 668-5541 or use the e-mail link provided.

You can also find more information on these issues, including some helpful links, at this page for [faculty authors](#).

# Copyright legislation left behind by the 109

*Mon, 08 Jan 2007 10:12:10, ksmith12@duke.edu, [category: copyright-issues-and-legislation]*

The 109<sup>th</sup> Congress adjourned last month without taking action on a number of copyright related bills.

Most significant amongst the un-adopted proposals was the “Orphan Works” act, which was first proposed as a stand-alone bill, then later incorporated with another, much less appealing, copyright amendment. Orphan works legislation is tremendously important for libraries, and is relatively uncontroversial, at least compared to many other copyright proposals. The legislation incorporates a proposal made by the Library of Congress that would amend the “remedies” chapter of the Copyright Act (Chapter 5 of Title 17 in the US Code) so that it would be easier to make use of works that are still in copyright protection but for which a rights holder able to grant permission for the use is unavailable. The potential user would be required to make a “reasonably diligent” search for the owner of the copyright before proceeding. After such a search, if a rights holder turned up later on, the only financial liability the user would have would be to pay a reasonable licensing fee for the use to that rights holder. A non-profit educational institution could avoid even this fee by ceasing to use the material.

Orphan works reform would greatly reduce the “chilling effect” that extended copyright protection has on libraries that want to prepare digital collections and displays. Often the material in question is quite old and no longer subject to any commercial marketing, but libraries are currently subject to significant damages if they use such material and are later confronted by a re-appearing copyright holder .

Two other pieces of legislation that were left unresolved were the “Broadcast Flag” proposal and the “Digital Media Consumers’ Rights Act of 2005.” The former would give the FCC authority to require that all digital TV signals contain code that prevents redistribution. Because its language about educational exceptions is unclear, this proposal seems to threaten legitimate educational exploitation of TV signals. The Consumer Rights Act, on the other hand, would create an amendment to the DMCA to allow consumers to bypass technological copy protection controls as long as that “circumvention” did not result in copyright infringement. This proposal would greatly simplify educational use of digital content.

# What copyright licensing issues are involved in digital publishing?

*Mon, 08 Jan 2007 12:27:42, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Digital publishing really involves three separable issues.

First is the author's rights that are negotiated when a work is published in traditional media. This is where an author's addenda comes in; they help preserve the right to make educational uses and to publish in online forums. These addenda are actually increasingly unnecessary, however, as publication agreements are themselves being modified to allow those rights in the first place. It is important for authors to negotiate with publishers to retain rights for digital publishing.

The second concern is the license that an online publisher obtains from the author for online distribution. If the work has been published in a traditional journal, the author has to be sure s/he has the right to allow online distribution, then they usually give a non-exclusive license to distribute to the online publisher.

The third concern is the license that the online publisher uses to try and control uses made of the work by the public who receives it. This is what the Creative Commons license is designed to do. The Creative Commons license relies on an assertion of copyright, so the person doing the licensing must hold the copyright for it to work. The CC license is a waiver of copyright, a statement that the copyright will not be enforced against certain uses (ie, attributed non-commercial uses) that will therefore not require any further permission.

For most online publications it is necessary to think about all three rights issues. The first will only arise if the online repository is publishing something that has already been published elsewhere. If the work is previously unpublished, this will not be a concern. The other two types of licensing issues will have to be decided, however.

Generally a digital publisher will want to get a non-exclusive license to publish the work from the author. This license should, in turn, confirm that the material will be distributed to the public under a Creative Commons license. By including in the license with the author a stipulation of how the material will be distributed, many later misunderstandings can be avoided. Indeed, prior awareness of each of these three rights issues in licensing digital content, and of how they inter-relate, will smooth over most of the potential legal rough spots as digital publication moves forward.

For a sample distribution license that anticipates distribution under the Creative Commons, see our [Scholarly Communications Toolkit](#).

# Open Access legislation stalled

*Mon, 08 Jan 2007 14:00:58, ksmith12@duke.edu, [category: open-access-and-institutional-repositories]*

Three important pieces of legislation for the Open Access movement stalled in Congress last term. None were adopted, and it seems likely that some of these proposals will be reintroduced in the new Congress, although the form may change.

Both the Federal Research Public Access Act, which would have required public access within six months for all published research that was supported by federal funding from the major funding agencies, and the less well publicized CURES Act, which would have mandated public access for funded medical research (much narrower than FRPAA), died when the last Congress adjourned and will have to be reintroduced in the 110th Congress in order to be considered.

The best chance for any public access mandate last term had seemed to be the NIH Reauthorization bill, which contained language to make deposit of NIH-funded research, now merely suggested, mandatory. That language was removed, however, before the Reauthorization bill was approved.

So the status quo on public access reigns.



# Copyright Resources on the Web

*Fri, 12 Jan 2007 09:07:58, ksmithl2@duke.edu, [category: copyright-in-the-classroom]*

The Association of Research Libraries provides an excellent brochure called “Know Your Copyrights” that summarizes what classroom instructors *can* do with copyrighted material:

- [Download the “Know Your Copyrights” brochure here](#)

These two sites offer good general overviews of copyright as it affects higher education and in-depth explanations of fair use:

- [University of Texas “Crash Course in Copyright”](#)
- [Stanford University Copyright & Fair Use Center](#)

This site addresses a number of additional scenarios involving fair use in course management systems:

- [Fair Use Scenarios for Course Management Systems](#)

These two checklist can help determine if a specific use falls into either fair use or the TEACH Act:

- [NCSU TEACH Act Toolkit Checklist](#)
- [IUPUI Fair Use Checklist](#)

This text is designed to help graduate students understand the impact of copyright law on their research and publishing:

- [Copyright Law and Graduate Research, By Prof. Kenneth Crews](#)

This chart will explain the complex determination of whether or not a particular work is in the public domain:

- [When Works Pass into the Public Domain](#)

When it is determined that permission for a particular use is needed, the Copyright Clearance Center should be the first stop:

- [Copyright Clearance Center](#)

# Recent Reads

*Sat, 10 Feb 2007 12:46:17, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: scholarly-publishing]*

Two recent books provide brief and interesting insights into two different aspects of scholarly communication.

Richard Posner, the amazingly prolific federal judge, has recently published “The Little Book of Plagiarism.” As both an academic and a judge, Posner is well placed to comment on the rash of high-profile accusations of plagiarism. His book is a thoughtful attempt to sort out why plagiarism is such an issue and to distinguish those situations in which it is worthy of sanction from those in which it is forgivable and even desirable. Among other useful discussions is his distinction between plagiarism per se and “creative imitation,” which is something upon which culture depends, and Posner’s use of “detrimental reliance,” a concept from contract law, as a way to highlight why certain instances of plagiarism are especially blameworthy. Apart from its overly sanguine assessment of the TurnItIn software product as heralding the end of plagiarism, this is an interesting and helpful meditation on a vexing contemporary issue.

“Art History and Its Publications in the Electronic Age” is a report issued in September of 2006 that takes an in-depth look at the special problems and potential of scholarly publication in art history, where the need to reproduce high quality images adds layers of copyright uncertainty, permissions expenses and production complexity to the already strained system of academic publishing. Its discussion of copyright issues is a balanced look at the needs of artists as well as those of scholarly authors, and its examination of the publication process should be enlightening to many readers. The concrete recommendations about how libraries and university presses might collaborate to improve the climate for art historical scholarship deserve widespread attention and consideration.

The art history report, incidentally, is available on the Internet under a Creative Commons license at <http://cnx.org/content/col10376/1.1>, or from Rice University Press’s digital print on demand service. I think this is the first POD book I have ever purchased, and I am very impressed by the speed and quality of Rice’s service.

# Know Your Copyrights

*Sat, 17 Feb 2007 19:11:40, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use]*

The Association of Research Libraries offers a concise and clear brochure, [Know Your Copyrights](#), that stresses multiple opportunities to use copyrighted materials in the classroom. It is intended to emphasize the positive things that classroom instructors are allowed to do with copyrighted material, employing the various [teaching exceptions](#) built into copyright law. It is an ideal resource for classroom instructors who want to quickly comprehend what they can do, instead of focusing on what is not allowed. The link on the title above offers several ways to download this helpful brochure.

# A model publication agreement

*Thu, 15 Feb 2007 12:28:14, ksmithl2@duke.edu, [category: authors-rights, category: scholarly-publishing]*

As the options for scholarly publication, and for reusing material in multiple different formats, expand, it is increasingly important that scholarly authors retain the right to reuse their own work in the classroom, in later publications and in open access repositories and webpages. While many people assume they have always retained these rights, until recently most publication agreements did not allow these uses, even by the original authors.

Fortunately, more and more publishers, especially academic presses, are beginning to rework their publication agreements to allow for these new opportunities in the digital environment.

Duke University Press uses a publication agreement that can serve as a model for faculty authors; it is simple, readable, and permits authors to retain an “unrestricted right” to make non-commercial uses of their own work. See a copy of this agreement here:

[Duke University Press journal publication agreement.](#)

It is also worth noting that Duke University Press will accept an exclusive right of first publication in situations where an author does not want to assign his or her copyright to the publisher. These arrangements are an excellent example of what authors should seek when publishing scholarly work.

The most important message for scholarly authors is to read your publication agreement carefully. For more information, click on the page listed above “For Faculty Authors” or contact the [Scholarly Communications Office](#).

# Fair Use Act introduced to rein in the DMCA

*Wed, 28 Feb 2007 09:53:22, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management, category: fair-use]*

Yesterday an important piece of legislation was introduced into the House of Representatives by Congressman Rick Boucher (D-VA) and two co-sponsors (one Democrat and one Republican, for those who keep score).

The Freedom and Innovation Revitalizing US Entrepreneurship Act, in spite of its awkward title intended to create the acronym FAIR USE Act, is an attempt to mitigate the negative impact of DMCA anti-circumvention rules on education, among other activities. Note that it is not a full-scale incorporation of fair use as a DMCA exception, which would create furious opposition, but a more limited attempt to improve the situation for education and for libraries.

Last fall, the Library of Congress approved an educational exception to anti-circumvention for the first time — a narrow rule permitting film and media professors to circumvent security measures in order to make compilations of film clips for classroom use. The new exception lasts for three years, after which it would either “sunset” or have to be renewed. The legislation proposed by Rep. Boucher would make all of the current six exception to the DMCA permanent.

More importantly, this bill would expand the scope of exceptions to the DMCA in ways that would really improve the climate for educational use of technology. The film clip exemption would be expanded to embrace all classroom compilations, not just those in film and media studies classes. Circumvention would also be allowed in order to gain access to public domain works, thus preventing commercial interests from “locking up” content that ought to be available for all to use. Finally, it would allow libraries to circumvent technological protections for purposes of preservation, helping to ensure that digital content will not be lost as technology changes.

This bill has been referred to the House Judiciary Committee, and its full text is not yet available on THOMAS, the Library of Congress database for tracking legislation. So stay tuned for further information and updates. But even at this early stage it is safe to say that passage of this bill would be an important step for instructional technology and library preservation of digital works, and it deserves our strong support.

# Traps for the Unwary

Wed, 07 Mar 2007 08:05:08, ksmithl2@duke.edu, [category: authors-rights, category: scholarly-publishing]

## Don't sign that book contract!

**Y**ikes! Careful with that pen! You've worked hard on your manuscript. Labored and lost sleep, wrenched just the right word out of your cerebrum, then tossed it aside, sweated the small stuff and the large, toiled and finally triumphed: a book contract is in your hands. Now, with just one slip of the pen, you could needlessly surrender rights and royalties.

*Money is almost everything.* It's not just about royalty rates (though we can talk your ear off about those). It's about reversion of rights and copyright clauses and options and non-competes, the sorts of things that can tie up your rights to your manuscript for a long, long time, or restrict your ability to publish your next book.

*We know all about book contracts.* We should; we've been at this for 94 years. Our attorneys haven't been with us since 1912, but they do have more than 45 years of experience in media contracts. We'll review your contract and let you know where you stand. Does your contract meet industry standards?

How can it be improved? We'll tell you, and we'll explain in genuine English what your contract means.

*We also know your budget.* First year dues are \$90. After that, dues are on a sliding scale, based on your writing income. We don't charge anything for contract reviews — they're a benefit of membership.

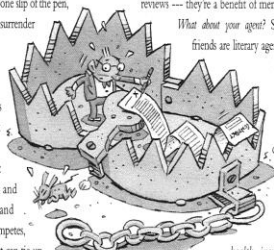
*What about your agent?* Some of our best friends are literary agents. Really. A good agent is worth her weight in royalty checks. If you have an agent, consider us another resource in getting the best deal possible.

*We also offer health insurance.* In many states, such as NY, CA, MA and CT, we offer discounted health insurance plans to published writers. Contact us for details.

*So join us and 8,000 of your colleagues.* Now. Before you lay pen to contract. We'll tell you what you're getting into, and how to make it better. Visit [authorsguild.org](http://authorsguild.org) to apply. Or reach us by e-mail or phone: [staff@authorsguild.org](mailto:staff@authorsguild.org), (212) 563-5904.

**AUTHORS GUILD**

THE VOICE of PUBLISHED WRITERS since 1912.



The Authors Guild recently ran this ad — Don't Sign that Book Contract — to warn potential authors of the traps that might lurk behind the fine print in publication agreements. The graphic of a tiny author, pen in hand, standing in the middle of a bear trap, makes their point vividly.

Scholarly authors face similar traps today; with all kinds of new methods for distributing and using scholarly work available to them, especially on the Internet, it is more important than ever to read publication agreements carefully and to negotiate to reserve appropriate rights when necessary. Just as the Authors Guild offers assistance to its members, the Scholarly Communications Office is happy to help faculty and student authors at Duke understand their copyrights and manage those rights as they navigate the publication process. Let us help you stay out of the trap!

# Troubling (and silly) journal policy

*Tue, 13 Mar 2007 08:09:20, ksmith12@duke.edu, [category: authors-rights, category: scholarly-publishing]*

My colleague Aisha Harvey passed on an e-mail pointing out one of the most absurd and troubling requirements I have ever heard of from a publisher. Apparently, at least some journals from Haworth Press, which publishes lots of “niche” journals in library science and other social sciences, claim to require a transfer of copyright to the publisher before they will **begin** the peer-review process.

Many journals, of course, still require a transfer of copyright before they will publish an article, although more and more are realizing that all they really need is an exclusive right of first publication. But to require the transfer before sending a submission out for peer-review is unheard of and unnecessary. I would not have believe it was true had I not seen the language on a [web page of instructions](#) for a Haworth journal myself.

Requiring copyright transfer before review raises the interesting question of what happens when a submission is rejected for publication in the Haworth journal. One has to wonder if this departure from the normal practice of waiting till acceptance to request a transfer indicates that the peer-review process is really a sham and that material is seldom if ever rejected by the journal.

I have published a couple of times in one of Haworth’s library science journals, but I will certainly think twice before doing so again. I hope others in the library community will reconsider both publishing and server as an editor or reviewer for any journal that has this silly policy; as librarians we should both know better and set an example of good practices in scholarly publishing.

## 8 Cool things about the Creative Commons

*Thu, 15 Mar 2007 09:24:47, ksmith12@duke.edu, [category: authors-rights, category: copyright-in-the-classroom]*

EDUCAUSE, which is a non-profit organization devoted to promoting “the intelligent use of information technology” in higher education, has recently been offering a series of sort informational pamphlets call “7 things you should know about...” The most recent item in this series is [7 things you should know about Creative Commons](#), and it is worth the attention of faculty seeking material that they can use in their classrooms without any of the copyright hassles that often arise.

The Creative Commons is a movement to encourage creators of all kinds of material to make their work available with only “some rights reserved” and with specific authorization for educational and other non-commercial uses already attached. Faculty who can find appropriate articles, image, video or music that is released under a Creative Commons license are way ahead in their ability to build a class without worrying about when and if the need to seek copyright permission. The two page PDF brochure linked above offers examples of teaching with Creative Commons materials, as well as more detail about what the Creative Commons is and how to find CC licensed material.

So what is the 8th cool thing about the Creative Commons? It is this [article from the NY Times](#) that describes the upcoming US tour by Brazilian songwriter and pop star Gilberto Gil, who also happens to be the Minister of Culture for his nation. As a musician and a government official, Gil is an important advocate for the Creative Commons, which is rapidly becoming an international movement. As the article says, “One of Mr. Gil’s first actions after becoming the culture minister in 2003 was to form an alliance between Brazil and the nascent Creative Commons movement.” To anyone teaching about Latin American music and culture, that alliance should be good news indeed.



# Copyright exceptions for teaching

*Tue, 26 Dec 2006 14:53:49, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use]*

There are three exceptions to the exclusive rights in copyright that help serve educational needs:

## **Face-to-face teaching — Section 110(1)**

Allows performance or display of protected material in a face-to-face teaching setting.

Must be in a classroom and at a non-profit educational institution.

Does NOT allow copying. This is an exception to the exclusive rights of performance and display, but not the right of reproduction.

Copying may still be allowed by fair use, however.

Performance and display in the classroom must employ a legally obtained copy — no “bootleg” copy is eligible for this exception, but borrowed copies are OK.

## **“Transmission” to registered students — Section 110(2), a.k.a. The TEACH Act**

Allows digital copies in course management systems under a specific set of conditions.

Text and images may be transmitted (displayed) in amounts comparable to in-class teaching.

Music and video may be used in portions; entire songs may be used if “non-dramatic.”

Access must be restricted to students registered in the course, and notice that the material is protected must be given.

Technological measures to prevent the material from being retained after the course is over or copied to others are required. Streaming of music and video is a good way to meet this requirement.

The institution should have policies and educational programs about copyright in place to take advantage of this exception.

## **Fair Use — Section 107**

A flexible exception that allows socially valuable uses of copyrighted material, including educational copying.

Fair use applies in many situations, but its application is never certain. A good faith decision in each situation is important.

Four factors are balanced to determine fair use:

1. The purpose of the use should be for non-profit education. If the use adds to the original in some creative way (like commenting on a poem or making a parody), the fair use argument is stronger.
2. Factual material is more susceptible to fair use; creative work like music and art gets stronger protection. Unpublished work also gets more protection
3. Use only that amount of the original work that is necessary to accomplish the educational purpose.
4. Avoid uses that substitute for purchasing available copies; damaging the market for the original counts heavily against fair use.

For a quick overview of what you can do with copyrighted material in the classroom, see the [Know your Copyrights brochure](#) from the Association of Research Libraries.

For more information about fair use, see this [illustrative use case](#), the [fair use checklist](#) from IUPUI and/or the [discussion of the four fair use factors](#) from the University of Texas.

For more information about the TEACH Act, see the [TEACH Act Toolkit](#) from North Carolina State University.

# Writing an encyclopedia article

Tue, 26 Dec 2006 15:02:59, ksmith12@duke.edu, [category: fair-use, category: scholarly-publishing]

*Q. I am writing an encyclopedia article and want to cull some facts from earlier articles on the topic. I will also quote a couple of passages from the same sources. Is there a copyright problem?*

Facts are not protected by copyright law. The date or the place of my birth, for example, are facts in which I can not claim any copyright, nor can any person who writes my biography. In so far as you are simply harvesting facts from various sources and repackaging them, no copyright issue is raised.

On the other hand, the expression of a fact can be protected by copyright law. An author would have a copyright interest in a specific sentence recounting my birth, and that sentence can not be directly copied without infringement. So you should avoid copying the expression of the facts that you are harvesting.

One complication of this distinction between fact and expression is the “merger” doctrine, which says that when a particular fact can reasonably only be expressed in one way (so that fact and expression “merge”), no copyright in that expression will be recognized. A plain statement that “John F. Kennedy died in 1963” would be an example — there is little creative about it and the expression really does merge with the fact. On the other hand this sentence — “JFK’s assassination in 1963 was the tragedy that defined the second half of the century” — surely does contain enough original and creative expression to be protected.

If your use of facts gathered from other sources does not copy protected expression, even if it occasionally repeats some uncreative expression that merges with the bare facts reported, there is no copyright issue at all. The citation of the sources from which the facts were gathered is, of course, good academic practice, but it is not required by copyright law.

When you quote or paraphrase a judgment, opinion or estimation, however, you are certainly in the realm of copyright protected expression. If you paraphrase, copyright does not enter the picture, because the expression is not being copied. Plagiarism, of course, might be an issue, and you address it by citing the source. If a direct quotation is used, so that expression is copied, [fair use](#) is the exception that prevents an infringement of copyright. The use of small segments of protected expression for the purpose of research and scholarship is a universally recognized instance of fair use and authors rely on it all the time. Only when longer quotations, diagrams, pictures or data sets are copied does it really become necessary to get permission. In doubtful situations, publishers will usually err on the side of caution and want you to obtain permission, even when these citations are probably fair use.

# Copying readings for students

*Tue, 26 Dec 2006 15:08:07, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use]*

*Q — I have two journal articles that I want every student in my class to read. May I make enough copies for everyone and hand them out? What about putting them in the Library's e-Reserves system? The Library subscribes to both of the journals from which the articles are taken.*

Both of the suggested uses seem like fair use. But it is important to stress that fair use, which is an exception to copyright's prohibitions that allows for socially desired uses, is very dependent on the specific facts of a situation. Without complete facts for each situation, any assessment of fair use must be tentative and illustrative only

The fair use exception to copyright allows for copying and distribution for a variety of uses. It lists several exemplary uses, including "multiple copies for classroom distribution." Although this seems pretty clear, over the years publishing industry representatives have convinced academics to agree to some pretty restrictive guidelines (the guidelines are just that, they are not the law). The guidelines suggest that making multiple copies and distributing them in class is appropriate only when the copied selection is brief and the use is spontaneous. So the first question is, are you copying only a single article from each of two publications? If that is the case, is this a one time use prompted by the fact that the articles fit very well into the current classroom topic? If both answers are yes, brevity and spontaneity both apply and you are squarely within fair use.

These guidelines, however, especially that regarding spontaneity, are too restrictive for application to all academic situations, both because they over-interpret the law and because they limit educational uses too much. The Perkins Library system has adopted an e-Reserve policy that does not include the spontaneity guideline. In other words, we allow articles to be put into the e-Reserve system even if they have been used in previous semesters and are not simply one-time reactions to specific classroom conditions. We believe this is still fair use because of the purely educational purpose of these e-Reserves and because they do not have a substantial effect on the market for the original, since because only small portions are used, the material would not be required for purchase even if it were not available on reserve.

The bottom line, then, is that if these are single articles from journal issues (rather than photocopies of entire issues, for example) the library would likely put them into the e-Reserve system for you. If you are going to use the articles in subsequent semesters, that is probably the best way to go, since each copy is then made by an individual student for his or her own personal use, rather than all being made and distributed by you. But in the meantime, making the copies and distributing them this semester seems like a fair use.

One more point is very important. If Duke already subscribes to an online database that contains either of these articles, the best practice by far is to simply link to that online version out of a course website or Blackboard page. Since the link will only work for authorized students, we will be complying with our license obligations and not posing any risk to the copyrights involved.

# Scanning to add to a Blackboard course site

Tue, 26 Dec 2006 15:16:44, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use]

*Q — Are there rules about what articles and other text I can scan myself and make available to students using my Blackboard course management website?*

Yes. Every use of copyrighted material in a course management website should be evaluated as a [fair use](#). When a fair use analysis does not support the use, either permission should be sought or some other material that is not subject to copyright substituted. In general, material that could not be used in print without permission also may not be used in a course web site without permission.

Fair use is a balancing test, and there is no certain way (short of a law suit) to know that a particular use is a fair use. To address this uncertainty, the copyright law provides that when employees of a non-profit educational institution make a good faith judgment about fair use, they are protected from most of the damages that a copyright owner could collect if they are found to be mistaken. So thinking about fair use and making a reasoned and defensible decision about it, is very important.

When we make a fair use determination, we have to balance four factors. No one factor, nor any specific combination of factors, is decisive in this analysis; we simply look at all four and decide if the overall balance favors fair use or if it points us toward seeking permission. It is generally agreed, however, that the first and fourth factors usually carry the most weight in the analysis.

The first factor is the purpose and character of the use. Educational uses favor a finding of fair use, whereas commercial uses count against fair use. Nevertheless, even a commercial use may be found to be fair if it is transformative, which means that it creates a new work with its own social value out of materials borrowed from the original. Comment and criticism, as well as parody, are often regarded as transformative uses.

The second factor looks at the nature of the original work. It is easier to make a fair use of factual or non-fiction material than of highly creative work. Also, unpublished work gets stronger protection, so that fair use, while still possible, is less likely.

The third factor is the amount of the original work that is used; the more of the work that is taken, the less likely a finding of fair use is. The best practice is to use no more of a copyright-protected work than is necessary for the educational purpose you are pursuing. Please note that the library's electronic reserves system suggests that no more than 10% of a whole work should be used in order to comply with fair use. It is also important to know that this factor may count against fair use if the "heart" of a work — its central message or point — is taken, even if the percentage of words copied is quite small.

The fourth factor is impact on the market for the original. In the context of course management systems, this means that scanning and distribution of articles or portions of books should never be used to substitute for having students purchase the original work. Such distribution should only be used for short readings from books that would not be assigned for purchase if the Blackboard system were unavailable. If a book is out-of-print but still in copyright protection and students will need to read a large portion of it, permission should be sought.

A [Fair Use Checklist](#) is available for help in making a fair use determination, as is a [detailed discussion of the fair use factors](#) from the University of Texas. You can also find [more fair use scenarios for course management systems](#) from UNC.

# Digital video in a Blackboard course site

*Tue, 26 Dec 2006 15:19:11, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: fair-use]*

*Q — Since I am allowed to show a video in class to my students, can I also put a digital version of that same film into my course Blackboard site where enrolled students can watch at their convenience?*

The two situations really are not the same. Digitizing a film makes an additional copy of that work which is not created when you simply show the film in class, and that digital copy, because it is so cheap and easy to distribute over the internet, poses a real threat to the copyright holder's interests.

For this reason, the teaching exception that allows you to put film clips into a course management site — the TEACH Act — is more restrictive than the face to face exception.

The TEACH Act is intended to facilitate distance education, and it applies to both fully distanced courses and “hybrid” courses, where classes meet together and also use content placed in a course management system. It allows the “transmission” of digital works only in systems that are restricted to students registered in the class. It permits distribution of “reasonable and limited” portions of films, provided that reasonable steps are taken to prevent students from making more copies or retaining a copy of the film clip beyond the duration of the class.

This means that only portions of a film can be digitized for inclusion in a Blackboard site. The amount used should be no more than is necessary to accomplish the pedagogical purpose, and must always be less than the whole. In order to prevent subsequent copying and distribution, streaming technology should be used for these film clips.

Before converting a film clip from analog format to digital for inclusion in a course management system, it is important to determine if a digital copy is available for purchase at a reasonable price. Only convert from analog if such a digital copy is either not available or is protected by an electronic copy protection system that prevents the use of a digital film clip.

The TEACH Act imposes some other conditions on the educational use of digital transmissions, some of which must be met by the institution rather than the individual instructor. North Carolina State University has developed a very useful [Teach Act toolkit](#) to help you understand and implement this exception to copyright law.

# Publishing recordings of student performances

*Tue, 26 Dec 2006 15:23:35, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: fair-use]*

*Q — Students in my language class are doing performances of plays and recitals of poetry that are being recorded. May I place these recordings where students in the class can watch them repeatedly to help reinforce the learning? Can I put them on the open Web to showcase my students' talent?*

This is a fairly complicated question, since it involves four separate elements.

First there is the issue of when the material being performed was published. Anything published before 1923 is in the public domain and can be performed, recorded and distributed freely. After 1923 there is a complex set of rules ([see chart here](#)) that determine whether something is still in copyright protection. Although much material published between 1923 and 1963 has in fact passed into the public domain, for simplicity sake we will assume here that such material is still protected.

The second element to consider is the genre of the material. The TEACH Act, which makes transmission to students in the class possible, distinguishes between performances of dramatic and non-dramatic works, with the former subject to more limited use. When the TEACH Act applies, only limited portions of a dramatic performance can be transmitted, while all of the performance of a non-dramatic poem, for example, is permitted.

Next is the issue of to whom the transmission is made available. If only students registered for the class can view the recordings, the TEACH Act applies. This means that we can use material that is protected by copyright as long as the specific requirements of that law are met. When the general public is the recipient, however, there is no exception that is likely to allow transmission of a performance of a protected work, so permission would be necessary. Performances of works no longer in copyright can be transmitted freely to either group.

Finally, it is necessary to be concerned about the privacy of the students whose work is being recorded. Those students have a right to protect the privacy of their educational records, including a recording of their classroom work. Although transmission to other students in the class probably does not endanger this privacy, if performances are available to the general public it is necessary to get a signed release form from each student whose work is recorded.



This chart provides a schematic overview of the various possibilities:

	<b>Available only to students registered in the class</b>	<b>Available to the general public via the Internet</b>
Poetry published in 1923 or later.	OK, based on TEACH Act rules re. non-dramatic performances	Only with © permission and a written waiver from the student(s) involved.
Poetry published before 1923.	OK (public domain)	OK with a written release from the student(s) involved.
Drama written in 1923 or later.	Limited portions only, based on TEACH Act rules re. dramatic performances	Only with © permission and a written waiver from the students involved.
Drama written before 1923.	OK (public domain)	OK with a written release from the students involved.

The general message to be gleaned from this analysis is that it is quite possible to use recordings of student performances, even on the open Web, provided that material is carefully selected and the students and the uses are planned for in advance.

# Digital Rights Management (DRM)

Tue, 26 Dec 2006 15:35:23, ksmithl2@duke.edu, [category: digital-rights-management]

## How can I deal with DRM protected material?

*Q — First things first; what is DRM?*

DRM, which stands for Digital Rights Management, refers to any of a number of systems that are used by producers of digital content to prevent or inhibit copying and distribution by consumers of the content they sell.

One of the most common DRM systems is the Content Scrambling System, or CSS, that prevents many DVDs from playing clearly on equipment that is not equipped with a proprietary decryption key. Another common product is Macrovision, which will cause a recording made from an encrypted VHS tape or DVD to be scrambled or faded. Also, many music CDs are sold with technological protections that prevent them from being easily copied, or “ripped,” onto a computer.

Although DRM systems are intended to prevent copying technologically, most of the systems are easy to defeat with decryption programs. The real force behind DRM systems is not technological but legal.

*Q — Are DRM systems really protected by law?*

Yes! The Digital Millennium Copyright Act of 1998 added provisions to the copyright law (chapter 12 of Title 17 of the U.S. Code) that make it illegal to circumvent DRM systems and to manufacture or sell technology designed to circumvent such systems. Both civil and criminal penalties are provided for by this “anti-circumvention” law.

*Q — Do all digital products have DRM protection?*

No. Some DVDs, CDs or VHS tapes are sold without any kind of electronic copy protection, although most such products probably do have some kind of DRM. Sometimes the packaging of the product will indicate the presence of a DRM system, such as when the name Macrovision is printed on a VHS cassette sleeve. Most of the time, however, one can be sure that a digital product is protected only by trying, and failing, to make a copy.

*Q — I want to make a copy of a film that is not DRM protected. May I?*

If the film is not protected by an electronic copy prevention system, it will not be a violation of the DMCA to copy it. But copying can often be an infringement of copyright, so you should only proceed with the copy if it falls into one of the [exceptions to copyright](#) like the TEACH Act or Fair Use.

*Q — I want to make a copy of a film that has DRM protection. May I?*

Probably not. Even if you have the software or device available to successfully circumvent the DRM make the copy, doing so is likely to violate the DMCA and could subject you to civil (money) damages and even criminal charges, if the circumvention is willful and for commercial gain.

There are several exceptions to the anti-circumvention provisions of the DMCA, and you should only proceed with the copying if you are certain that what you are doing fits within one of these exceptions, which are very narrow.

*Q — What are the exceptions to the anti-circumvention rules that enforce DRM?*

There are several exceptions to these rules, but only two that really are useful for educational copying.

The first is for film and media studies professors who want to make compilations of portions of video for use in the classroom. This exception applies only to film clips and only to professors who are teaching film or media studies; note that it does not allow circumvention in order to copy whole films into a course management or distribution system. The films used to make these allowable compilations must be owned by the University library system.

The second exception to the anti-circumvention rules really only benefits technology staff and researchers; it allows one to avoid copy protection systems when one is trying to make a protected piece of digital content interoperable with another, independently created software product, as long as the purpose of the interoperability is not itself an infringement of copyright.

For help deciding if either of these exceptions to the anti-circumvention rules applies to your situation, please contact the [Scholarly Communications Office](#).

# Copyright and plagiarism

Tue, 26 Dec 2006 15:37:12, ksmith12@duke.edu, [category: copyright-in-the-classroom]

## What should I know about how copyright and plagiarism relate?

*Q — How is copyright related to plagiarism?*

Plagiarism is best defined as the *unacknowledged* use of another person's work. It is an ethical issue involving a claim of credit for work that the claimant did not create. One can plagiarize someone else's work regardless of the copyright status of that work. For example, it is nonetheless plagiarism to copy from a book or article that is too old to still be under copyright. It is also plagiarism to use data taken from an unacknowledged source, even though factual material like data may not be protected by copyright. Plagiarism, however, is easily cured — proper citation to the original source of the material.

Copyright infringement, on the other hand, is the *unauthorized* use of another's work. This is a legal issue that depends on whether or not the work is protected by copyright in the first place, as well as on specifics like how much is used and the purpose of the use. If one copies too much of a protected work, or copies for an unauthorized purpose, simply acknowledging the original source will not solve the problem. Only by seeking prior permission from the copyright holder does one avoid the risk of an infringement charge.

*Q — What if I just take an idea from another source but do not copy the words?*

Copyright does not protect ideas, only the specific expression of an idea. For example, a court decided that Dan Brown did not infringe the copyright of an earlier book when he wrote *The Da Vinci Code* because all he borrowed from the earlier work were the basic ideas, not the specifics of plot or dialogue. Since copyright is intended to encourage creative production, using someone else's ideas to craft a new and original work upholds the purpose of copyright, it does not violate it. Only if one copies another's expression without permission is copyright potentially infringed.

To avoid plagiarism, on the other hand, one must acknowledge the source even of ideas that are borrowed from someone else, regardless of whether the expression of those ideas is borrowed with them. Thus a paraphrase requires citation, even though it seldom raises any copyright problem.

*Q — Where can I learn more about plagiarism?*

The Duke Libraries have an extensive [guide to avoiding plagiarism](#). For a broader discussion of issues involving academic standards and the consequences of their violation, see the web site of Duke's [Academic Integrity Council](#).

# YouTube, Copyright and Innovation

*Tue, 20 Mar 2007 08:04:51, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

When Viacom filed a copyright infringement lawsuit against YouTube, which is owned by Google, we all knew that the fur would fly. No one is neutral about Google these days, and YouTube has also created fierce partisans in the copyright wars.

It is quite possible that the lawsuit is simply a bargaining tool in the fight over the licensing payments that Viacom wants from Google, but, if the case goes to trial, the real issue will be how far copyright law can be used to prevent technological innovations that depend, to some degree or another, on using copyrighted material without permission. This debate is at least as old as the photocopier and the VCR, but the terms of the rough deal struck by the Supreme Court in the 1984 Betamax case are still being contested.

Several newspaper and online columns over the weekend cast interesting light on this debate.

In the [New York Times on Sunday \(March 18\)](#), Larry Lessig of Stanford Law School makes the important point that Viacom is trying to use the courts to get around the compromise on innovation versus infringement that was established by Congress when it passed the Digital Millennium Copyright Act. The DMCA created a “safe harbor” for ISPs that merely hosted infringing material on their servers without specific knowledge of the infringement, so long as they act according to prescribed procedures once they have such knowledge. Now Viacom, emboldened by the Supreme Court decision in the Grokster case, is trying to revise that compromise through the back door, using the Courts new “inducement” theory of secondary copyright liability to undermine the policy Congress enacted.

Many predicted that the Grokster decision would have a chilling effect on technological innovation; Lessig’s column suggests that the Viacom suit is a huge block of ice to contribute to that chill.

Along the same lines, [Fred von Lohmann of the Electronic Frontier Foundation writes](#) about all of the new technologies that might not have seen the light of day if copyright holders could sue based on the potential that users of the new innovation could infringe those copyrights. Even if one excludes the hyperbolic inclusion of reading glasses on his list, von Lohmann makes a powerful point — photocopiers, VCRs, iPods and even public libraries might be subject to restrictions and per-use fees in the world Viacom envisions.

James Boyle, in a [column in the Financial Times](#), tries to put this debate in perspective by noting that, although it is sometimes difficult to feel sympathy for the ravenous giant that Google has become — it is no longer, as Boyle says, “a helpless start-up” — the interests that Google has pursued in its copyright conflicts often line up with the public interest. His reminder that the issues are much more complex than simply yelling “stop thief” at YouTube and Google (a tactic which Google’s rival Microsoft tried in a recent speech and op-ed), and that we as consumers of intellectual property also have an important horse in this race, are welcome indeed.

# Another warning for faculty authors

*Thu, 22 Mar 2007 09:01:55, ksmithl2@duke.edu, [category: authors-rights, category: scholarly-publishing]*

Our Scholarly Communications colleague at UNC, Deborah Gerhardt, just published this [important warning about publication contracts](#) in the Chronicle of Higher Education.

Her point that so-called “non-compete clauses” can hamper a scholar’s ability to publish later work on a particular topic is another reminder that, as the conflicts over copyright get more intense, it is vitally important to read publication contracts carefully. Deborah provides examples of language to look for and language to beware of, and the Duke Scholarly Communications office is always willing to help examine publishing agreements for faculty and student authors in order to protect those rights that are most important for supporting continued creativity and scholarship.

# More about the FAIR USE Act

*Sun, 25 Mar 2007 19:10:23, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management, category: fair-use]*

Several weeks ago I promised more comment ([read previous post here](#)) after I had read up on the proposed law, so here goes.

Perhaps the biggest confusion about the FAIR USE Act is caused by its name; since it is really aimed at reforming the anti-circumvention rules of the DMCA, it does not directly deal with the fair use provision of the Copyright Act. In fact, in his remarks while introducing the bill, Rep. Boucher explicitly stated that “the revised bill does not contain the provision which would have established a fair use defense to the act of circumvention.” Boucher’s co-sponsor, Rep. John Doolittle acknowledged in a recent interview that it was necessary to narrow the scope of the bill somewhat by eliminating such a provision because the content industry would oppose a full fair use defense so vigorously.

But the FAIR USE Act does not entirely ignore fair use either. Rather inconsistently, Rep Doolittle, in the same interview mentioned above, also referred to the proposed bill as an attempt to “preserve fair use for the consumer.” What the FAIR USE Act actually would do is to introduce an exception to the anti-circumvention rules that is not as broad as fair use, but that would establish a defense to charges of circumvention that looks a lot like fair use. Specifically, section 3(b)(v) of the new bill would allow circumvention to gain access to “works of substantial public interest... for purposes of criticism, comment, news reporting, scholarship, or research.” This sure sounds like fair use, especially in its focus on activities strongly protected by the First Amendment. One major difference is that, by providing an exclusive list of the allowable purposes for circumvention, this bill would not permit circumvention for most commercial purposes, even if the use would otherwise fit within fair use. Also, “works of substantial public interest” is presumably a narrower category than all the works that might be subject to fair use, but defining this narrower category would certainly generate as much as litigation as fair use itself does.

The big question for the FAIR USE Act is whether it has any chance of passage. Two previous versions (which did include a full fair use defense to circumvention) failed to advance very far in Congress. Rep. Doolittle admits frankly that the change to a Democratic-controlled Congress has not significantly improved chances this year, since the new Chair of the relevant House committee is less sympathetic to the bill than his predecessor. The hope is that the somewhat narrower scope of the bill, combined with increasing public awareness of the draconian impact of DMCA anti-circumvention rules, will improve the environment this time around. Given the other valuable (and necessary) provisions found in the bill for libraries and for classroom teaching, even a version without the broad exception quoted above would be worthwhile.

[Listen here to a podcast \(optimistically called “The beginning of the end for the DMCA”\) of the interview with Rep. Doolittle about H.R. 1201, the FAIR USE Act.](#)

# The downside of playing nice

*Wed, 28 Mar 2007 14:53:44, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

There has been lots of talk in copyright arenas recently about settlements. Some settlements, like the “pre-litigation” settlements the RIAA is offering to college students, where the industry collects roughly the same amount they had been getting from their lawsuits without having to bear the expense of actually filing, are clearly bad deals for the public. But the downside of other settlements is not so obvious.

Recently English professor Carol Schloss settled her lawsuit against the James Joyce estate. She had sought a declaratory judgment that quoting from unpublished letters between Joyce and his daughter Lucia in a scholarly book was fair use, and the settlement was clearly a victory for Schloss. The Joyce estate agreed not to sue her for using the excerpts, which had been removed from her book about Lucia under threat of an infringement claim, on her web site and in future publications. But it is less clear that this is a victory for scholarship in general. If the case had gone to trial, a decision would have had precedential value, and we would have had another bit of clarity in the murky world of academic fair use. Fair use is so ambiguous that scholars often refrain from certain uses simply to avoid the uncertainty. Most of us assume that quoting from primary sources in scholarly work, just as Schloss wanted to do, is fair use, but it would have been nice for a court to confirm our impression.

Instead, the settlement agreement only resolves the issue between the parties to the case and has no impact on fair use for the rest of academia. In fact, the AP paraphrased the attorney for the Joyce estate this way: “Nelson also noted that the estate granted only Schloss permission to quote the materials under limited circumstances, meaning neither she nor other scholars would be permitted to use them outside the scope outlined in the settlement agreement.” Not really a Pyrrhic victory, but not a helpful one either.

Suggestions that the various publishers who are suing Google over the Book Project might settle for some lump sum payment from Google’s deep pockets offer a similar prospect. If Google were to lose its fair use claim in court, of course, the effect on fair use for the rest of us could be profoundly negative. But if they fought on and won, the prospects for library digitization and public access would be much brighter. A settlement, however, will set only one precedent — that lots of money can solve all disputes. It will not clear up the fair use picture and it will not benefit libraries that can not afford to purchase the right to digitize their collections for the benefit of the public.

So with all due respect to my grandmother’s admonition to get along with everyone, I have to recognize that sometimes there is a downside to playing nice and coming to a settlement agreement.



# Thank you, Stanford

*Wed, 04 Apr 2007 08:56:10, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The copyright world owes a debt of thanks to Stanford University for creating a [database of copyright renewal records](#) for books published between 1923 and 1963. These dates are significant because anything published before 1923 has fallen into the public domain, while works published after 1963 had their copyrights renewed automatically by the 1976 Copyright Act. That leaves a lot of material in a kind of netherland — assuming the book was published with notice and registered, its copyright had to be renewed (under the earlier U.S. copyright law) after the initial 28 year term in order to have a second 28 year term. If a registration was not renewed (and many were not), the work fell into the public domain; if it was renewed, the work was automatically brought within the ambit of the new law and will be protected until at least 2019.

So it has been very important to know if these mid-century works were renewed or not. Unfortunately, the only Copyright Office records at the Library of Congress that are online are those filed after 1977, so there has been a big gap for which one either needed to search the printed volumes that were published every six months or just give up on knowing for certain. Now it is possible, and much easier, to determine with some precision whether or not many mid-century works are in the public domain and, therefore, freely available for scholarly use, digitization by libraries, etc.

It is interesting that the Google Book Project has treated all post-1923 publications (even government publications that are not subject to copyright protection) as still protected by copyright, giving that project an artificially narrow window on the public domain. Because Google's scanning work is done so fast and in such volume, it is probably unrealistic to expect them to make fine copyright distinctions. Nevertheless, those distinctions just got a lot easier, and it is to be hoped that Google, or other digitization projects, will use the Stanford database to provide greater access to material that really is the common property of our intellectual heritage.

# Would a new copyright law be good news?

*Mon, 16 Apr 2007 10:21:05, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

Professor Jessica Litman of the University of Michigan (and author of “Digital Copyright”) recently spoke at the Duke Law School in a lecture sponsored by Duke’s [Center for the Study of the Public Domain](#). Although I was traveling on the day of her lecture, I had a chance last week to listen to the webcast, and I was especially struck by her comment that the U.S. is in the early stages of a copyright revision cycle. Recognizing that the last such cycle took nearly twenty years, it still seems appropriate to ask, assuming that Prof. Litman is correct, whether or not this would be good news.

At her [Collectanea blog](#), our scholarly communications colleague at the University of Texas, and well-known copyright attorney, Georgia Harper has been emphasizing new business models that are developing around intellectual property and discussing whether or not those new models bode well for educational and consumer uses of protected material. See her posts [here](#) and [here](#) for this excellent discussion. Litman’s suggestion, however, that we are starting to see movement toward a revised copyright law, raises a similar question about how a new law might be better or worse for education and for consumers.

With no details at hand, detailed speculation is useless, of course, but it is still possible to take note of one possible dynamic. It is certainly true that, in the piecemeal amendments to the copyright law that we have seen in recent years, consumers and educators have not fared well. Is there any reason to think we might do better in a complete overhaul? I think there is. When Congress is considering a small change to the copyright act, they tend, I suspect, to listen to the industry voices that they hear from most regularly. When time and attention is limited, one pays attention to the sources of information and opinion that are familiar and close at hand. But in the longer process of a complete revision, it is likely that other voices will get to the table and will be heard more thoroughly; education groups and consumer advocates would, I hope, have a more complete opportunity to make their case about how copyright helps and hinders them, both to Congress and to an increasingly interested public.

I don’t know if Prof. Litman is right about a new revision cycle or not, but until I have reason to believe otherwise I am going to treat the possibility as a reason for optimism.

# WKRP in copyright limbo

*Sat, 21 Apr 2007 08:33:02, ksmithl2@duke.edu, [category: copyright-in-the-classroom]*

How do the struggles to release a DVD of a 1970s era sit-com inform our difficulties with copyright in higher education? At the very least, the problems encountered in preparing a DVD of “WKRP in Cincinnati” illustrate the complex layers of rights with which academics who study or create multimedia must deal.

Those of us old enough to remember WKRP will recall that, in a sit-com set in a radio station, pop music was a central part of the story. Often the humor of a particular situation was created or enhanced by the music being aired on WKRP. The sound track of the show was a collection of contemporary pop, but the producers only licensed those tunes for a limited time. It was difficult, in 1982 when the show ended, to anticipate the need to release the shows in a format that had not yet been invented. But once the licenses expired, the music could not be used in subsequent releases, so a DVD of the show has been long delayed.

As William Patry explains in his [blog post on this case](#), the complexity of music copyright is that there are multiple rights and rights holders for each recording, including, at least, a copyright in the underlying composition (sometimes one for the music and one for the lyric) and a copyright in the performance. When dealing with video, the rights situation is even more complex, with layer upon layer likely owned by different people. These are the complications that go into re-releasing a TV show, but they are also the difficult shoals that have to be navigated when an academic wants to use existing video to teach filmmaking techniques, for example, or get permission to put a video into a digital archive.

The good news (if you were a fan) is that WKRP in Cincinnati will be released on DVD shortly. The bad news is that much of the contemporary pop music has been replaced with “elevator music” versions that were much cheaper for the producer to license. All those classic songs will no longer be “living on the air in Cincinnati.” This small piece of TV history has fallen victim to the same burgeoning and increasingly expensive market for permissions that holds back much academic innovation in multimedia.

A more serious look at these problems for higher education can be found in the 2006 white paper from the Berkman Center for Internet and Society called “The Digital Learning Challenge,” which is linked under recommended reading in the right hand column, through our Connotea feed. It is a detailed (and rather discouraging) look at the many ways current copyright law hampers digital teaching and learning, and it isn’t even enlivened by a sound track featuring Pink Floyd or Blondie.

# Public Domain according to Google

*Mon, 30 Apr 2007 07:34:32, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

It has been a busy two weeks, and I am rather late in adding my comments to [Raizel Liebler's "Open Letter to Google."](#)

The letter, which points out that Google declines to treat government documents as public domain works, even though section 105 of the Copyright Act says that copyright is not available for any work of the US government, has attracted considerable comment, but I still want to add my two cents.

Although Google seems to be the biggest champion copyright reformers have these days, there are several reasons not to rely too heavily on a large corporation principally interested in its own bottom line. As I have [noted before](#), if Google uses its deep pockets to settle its fair use conflict with publishers, the situation for the rest of us is likely to be worse, not better.

Another problem with the Google Book Project is the speed with which it is being carried out, and the consequent inability to take adequate care for the results. As I librarian, I was distressed to find, while helping a researcher who had located a "snippet" on Google, that the citation on the snippet page was not to the correct source of the passage. The title page image displayed with the snippet referenced yet a third work, neither the one cited nor the source of the snippet. Such lapses make Google very problematic for its stated purpose — online access to the world's off-line literature.

Raizel's letter points out another problem — Google is assuming a overly narrow view of the public domain. Whether government documents are excluded because it is too difficult and time consuming to decide what is or is not a government work or because of an obscure fear that copyrighted work might be cited with a government production, the public is being denied some of the benefit promised. Google's representation of the public domain is further constrained by the assumption that all post-1923 works are protected, even though the protection on many will have lapsed due to non-renewal, back when renewal was required. The public domain according to Google is much smaller than it needs to be, and those who hope that Google will lead the way toward free digital access to our shared intellectual heritage should take note and scale back their expectations.

# Sign of the Times

*Wed, 02 May 2007 15:32:57, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

It has got to be significant for higher education when the New York Times endorses open access textbook publishing. That is exactly what happened in [yesterday's editorial](#) about a proposed disclosure law for textbooks being considered in Washington state. The concern over textbook prices is not new, of course, but the attention the NY Times gives to an open access model surely is unusual. The editor moves from endorsing the proposed law to suggesting that disclosure is not enough; “creative solutions” like the Rice University Connexions project are required.

[Connexions](#) is an open-source and open content experiment at Rice, supported by the William and Flora Hewlett Foundation, that allows users to create and publish academic “modules” that others can locate, download and print for educational purposes. All of the content is offered under a [Creative Commons](#) license. The Times notes that one can print a 300 page textbook in electrical engineering from Connexions for a lot less money than it would cost to purchase a similar work, and right now users can also find featured course material for music and corporate governance at the site. In fact, there are almost 4,000 modules available on Connexions, browsable by subject area. With the NY Times getting on board, this may be a real harbinger of the future in higher education.

# Fair Use on NPR

*Wed, 09 May 2007 15:08:44, ksmithl2@duke.edu, [category: fair-use, category: scholarly-publishing]*

A [recent NPR story](#) highlighted fair use as an important exception to the exclusive rights of copyright holders and discussed the [Stanford Fair Use Project](#), a legal clinic designed to help artists, scholars and others defend fair use as they create new works. Although the focus of the story was a humorous and highly irreverent video creation that depicts Jesus Christ dancing to Gloria Gaynor's well-known song "I Will Survive," there is a good deal in the story for more traditional academic authors and creators to take note of, and perhaps to worry about.

The Stanford Fair Use Project convinced Universal, the music company that owns the rights to the Gaynor song, to back down by sending a letter pointing out the strong protection given to parody in fair use doctrine. Many scholars will also have heard of the Fair Use Project earlier this year because of their role in helping a scholar who wrote a book about James Joyce's daughter Lucia wrest from the Joyce estate a concession that she could publish letters written by Lucia and her father as part of her work. (There is an interesting article about Lucia Joyce and Professor Schloss' work [here](#).) One of the points from that conflict, that is reenforced in the NPR story, is that publishers are often unwilling to publish work that uses copyrighted material in spite of the vital role of fair use in making critical scholarship and comment possible.

Almost any campus official who deals with copyright can tell stories about the trials of helping scholars get work published when copyrighted material — often letters and/or illustrations — is involved. Sometimes the publisher demands that the author obtain and pay for all the permissions, even when a clear case for fair use can be made and the project lacks the funding to pay permission fees, or else a copyright holder denies permission (as the Joyce estate did) and the publisher is unwilling to proceed in reliance on fair use.

It is not surprising that publishers are wary of getting sued, no matter how strong their fair use defense might be. It is expensive to defend even a baseless lawsuit, and, as the Director of the Stanford Project pointed out to NPR, copyright holders frightened by the digital revolution are resorting more and more to frivolous threats in order to prevent creators from relying on fair use.

Scholars should take note that a critic of the Stanford Center and of strong fair use protection in general claims in the story that universities are trying to destroy the very idea of intellectual property and he advocates a greatly restricted application of fair use. As absurd as the first claim is, since scholars are major producers of intellectual property, the threat of more restricted fair use protection is very real. Powerful voices are calling for less fair use, an academics must be aware of its role in scholarly production and actively assert it where it applies. The goal is not so much to push the fair use boundaries forward but merely to keep them where they have traditionally been, as a bulwork to encourage and protect scholarly creation.

# RSS explained by Educause

*Mon, 14 May 2007 10:20:31, ksmithl2@duke.edu, [category: scholarly-publishing, category: technologies]*

A couple of months ago I [wrote about Educause's "7 Things You Should Know About Creative Commons,"](#) which is part of a series designed to help faculty and administrators keep current with technologies that impact scholarly communications. Now a new virtual pamphlet is available, "[7 Things You Should Know About RSS.](#)" RSS, which is usually said to stand for "Really Simple Syndication," is an Internet protocol that allows users to subscribe to content feeds from lots of blogs and other web resources, and aggregate that content into a convenient reader.

Many readers of this blog probably already know about RSS, since it is one of the ways to [subscribe](#) to our feed. But it is worth keeping this simple, jargon-free explanation in mind, along with the other 2-page pamphlets in the series, because they are so useful for explaining to others those things that we ourselves might use frequently but have difficulty articulating. As it does so often, [Educause](#) has provided an important service to the world of technology in higher education.

# Criminal infringement?

*Wed, 16 May 2007 15:22:32, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

A colleague has recently posted a [comment](#) wondering about the impact of a piece of legislation suggested to the Congress this week by Attorney General Gonzales' office, the "Intellectual Property Protection Act of 2007." In a [letter sent to the Speaker of the House and the President of the Senate](#), the AG proposes a series of amendments that would increase the enforcement of, and penalties for, criminal copyright infringement.

For most of our history, copyright has been an entirely civil matter, where an aggrieved party would sue the infringer directly for money damages and, sometimes, an injunction to stop the infringement. Only in recent years have we included criminal infringement in the law, where the government itself prosecutes the infringer and penalties can include fines and jail time. Most infringement is still handled through civil suits, but [section 506\(a\) of the Copyright Act](#) now defines criminal infringement in pretty broad terms. For infringement to be prosecuted as a crime, it must be willful, done for commercial advantage or financial gain, and involve either the copying and distribution of works with a total retail value of \$1,000 or more or the distribution of a commercial work on a public network. This definition is broad enough to catch many activities like file-sharing in the criminal net, as it is intended to do, but it could also conceivably be used to prosecute other activities that occur in higher education, if the courts were to interpret "willful" and "commercial advantage" broadly enough.

The proposed changes to the law of criminal infringement include increasing penalties (up to life imprisonment for counterfeiting activities that result in a death), including "attempted infringement" as a new offense, giving wiretap authority for infringement investigations and making it easier for authorities to seize materials used in criminal infringement.

While some of these changes seem like a bad idea to me (like the notion of attempted infringement), it is not clear what impact they would have on the fair use provision that is so important to higher education. Presumably a reasonable reliance on fair use would defeat the willfulness requirement for criminal penalties to apply. My broader concern is that the increasing treatment of copyright infringement as a criminal offense is fundamentally opposed to the purpose of intellectual property law as expressed in the Constitution. Congress is allowed to make law around copyrights and patent rights in order "to promote the progress of science and the useful arts." This justification reminds us that intellectual property is a public good and is thus different from physical property. Once we start treating copyright law as protection for a purely private property interest, similar to laws against car theft, we step outside the rationale for federal action. Criminal law is usually a matter for the states, and Congress should remember that the reason it is given the power to legislate in this area is precisely because more is involved in copyright than mere private interests.



# Caching, Thumbnails and a Fair Use Win

*Fri, 18 May 2007 12:43:05, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

I am generally wary of relying too heavily on Google to fight all of the battles in copyright law, mostly because their interests and those of higher education don't always seem very similar. But a fair use win for Google is usually good news for us as well, and the case decided recently ([here is the decision in Perfect 10 v. Google](#)) by the Ninth Circuit Court of Appeals is important on a number of points.

The Court of Appeals variously upheld and reversed parts of the previous district court ruling, but the upshot was that fair use was found for three specific activities: the routine caching that computers must do to display web pages, in-line linking and framing of web pages where the target page never resides on the server controlled by the web author doing the linking, and using thumbnail versions to index images found elsewhere on the web. None of these holdings are unique or new, but the Ninth Circuit does a nice job of explaining the technology involved and the reasoning behind its ruling. The "server test" used to find that in-line linking is not an infringement seems so simple and intuitive that one has to fear that other courts will try to complicate it. Linking, of course, is an important way that higher education tries to avoid infringement, so it is nice to be reassured.

As for caching, it seems amazing that we should have to be reminded, but the Court's analysis is clear and useful:

[E]ven assuming such automatic copying could constitute direct infringement, it is fair use in this context... a cache copies no more than is necessary to assist the user in Internet use... Such automatic background copying has no more than a minimal effect on Perfect 10's rights, but a considerable public benefit.

The only rain on Google's parade is some language about secondary liability (liability for contributing to direct infringement by someone else) that could pose problems for Google in that part of the present case, which was remanded to the lower court, and in the future. An nice explanation of the potential harm in this part of the opinion is available [here on Prof. Wendy Seltzer's blog](#). For higher ed., however, this case is a nice reminder of principles that are necessary and ought to be obvious.

# Publisher position on author rights

*Sun, 20 May 2007 14:45:48, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

Three academic publishing organizations recently released a short position paper called "[Author and Publisher Rights for Academic Use: An Appropriate Balance](#)" that is worth a look from all who are concerned about scholarly communications. For higher education, the position paper contains elements that evoke hearty agreement and others that demand objection.

If, as a [recent comment on the LibLicense list](#) suggested, the purpose of the paper is to call wide attention to two facts, that many scholarly journals already have very "scholar-friendly" policies built into their publication agreements and that copyright is not necessarily a barrier to academic discussion and comment, there would be little to argue with. It is quite true that many academic journals already allow authors to retain many or most of the rights necessary for subsequent teaching and research uses. It is important that authors read those agreements to be sure this is true in their specific case and to consider whether or not self-archiving or some other form of electronic deposit is permitted, since such access is becoming more and more important to scholars and to scholarship.

On the issue of digital "open access" availability, the position paper takes an awkward stance. While citing several journals that have adopted "author-pays" models of open access as leaders, the paper marshals several arguments against mandated public access for research funded with public money. Some of these arguments are self-contradictory; if one fear about open access is that it will "confuse the scientific record," why is it suggested that a better course than mandating access to the final version of an article is to post pre-prints? While pre-print repositories seem less threatening to the traditional business model of journal publishing, the scientific record is best preserved when access to the scholar's final word is available to all.

One comment at the very end of the report deserves comment. The publishing organizations take note of the educational exceptions and limitations built into copyright law but assert "that these exceptions are thus far limited to traditional photocopying and do not permit the exploitation of such materials [journal articles] over the Internet." This is wishful thinking; no court, that I am aware of, has decided one way or another about how far educational exceptions apply in the digital realm. The TEACH Act, although largely a failure at its stated purpose, is clearly intended to apply some leeway for education to the Internet. And the oft-repeated assertion that copyright law is technology neutral implies that there is fair use on the Internet, as the recent [Perfect 10 decision](#) held, even if its educational boundaries have not yet been clarified.

# Helprin, Chaucer and literary influence

Tue, 22 May 2007 06:28:59, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation]

Several colleagues have asked me if I don't have some pithy and devastating response to make to the opinion piece by Mark Helprin in Sunday's New York Times, [A Great Idea Lives Forever. Shouldn't its Copyright?](#) In some ways the best refutation of Helprin's editorial is simply to consider its title carefully. Do we really want great ideas owned by individuals forever? While copyright does not, of course, protect ideas, perpetual copyright would vastly increase the amount of litigation needed for any new work of creativity in order to prove that its dependence on all that had preceded it was on the correct side of the idea / expression line. What a powerful weapon the James Joyce estate would wield to suppress criticism and scholarship for many, many more years if Helprin got his wish.

Should Boccaccio have been able to sue Chaucer to establish that only ideas and not expression were appropriated when Chaucer wrote his "derivative works?" Without literary borrowing, the great works of world literature would not have been possible; Chaucer could not have written *The Canterbury Tales* and Mark Helprin could not have written... whatever Mark Helprin has written. Then there is the culture of remix and parody fostered by the Internet — a whole new kind of creativity that should not be stifled in its infancy. So perhaps the most appropriate response to Helprin is to read another recent article that celebrates the interplay and interpenetration of cultural creation, [The Ecstasy of Influence by Jonathan Lethem](#), which appeared in Harpers in February 2007.

# A Seventy Percent Solution?

*Sat, 26 May 2007 08:31:30, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation]*

It is a little bit belated to be pointing out this [April 7 article \("It's a Steal"\) by John Lanchester](#) from the Manchester (UK) Guardian website, but it provides a nice counter piece to the screed advocating perpetual copyright that appeared in last week's NY Times (see post [here](#)). Lanchester, at least, is aware of the balance that copyright law is supposed to strike between incentives for creators and the public interest in access to information and the raw materials for new works. He offers a poignant example of how copyright restrictions have hampered his own creative efforts as an author, and he takes a quick but eloquent romp through the history of copyright law in England. Most important is his acknowledgement that 70% of creative works are currently still protected by copyright but no longer in print. This massive limitation on public access with little corresponding economic benefit to creators is, perhaps, the worst imbalance created by current laws (although Lanchester also cites the extension of copyright term whenever Mickey Mouse looks over the abyss of the public domain). The solution he suggests, a limited copyright term with an ongoing right to minimal royalties, is not fleshed-out well at all, and may be unworkable, unwise, or both. The point is not that this one author can solve the problem; the value of the article is for a creative writer to recognize publicly that our current law has swung too far toward protection and needs to be realigned.

# Ineffective Technological Protection Measures?

*Wed, 06 Jun 2007 11:27:52, ksmithl2@duke.edu, [category: digital-rights-management, category: technologies]*

Recently we have seen some music companies move away from using technological protection measures to prevent copying songs onto multiple devices or those sold by different companies in favor of a market solution that charges consumers slightly more for music that can be freely copied. Now another brick, albeit a tiny one, has fallen from the wall of electronic protection measures.

Both the DMCA in the United States and the European Union's Copyright Directive are designed to implement an international treaty that calls for legal enforcement of "effective technological protection measures." Both laws use that phrase, but the way they define it differs a bit. The European definition, which says that, to be effective, a technological protection measure "must achieve its protection objective," was recently used by a court in Finland to declare that CSS (Content Scrambling System), the protection code used on most DVDs, was ineffective and therefore no longer protected from circumvention by law. See [Electronic Frontier Foundation posting on the case here](#).

The problem, according to the Helsinki District Court, is that the code for circumventing CSS is all over the Internet. Some consumers that download software for copying DVDs may not even know that they are circumventing a technological protection measure when they do so. In these conditions, the court said, CSS is simply not effective under the EU definition. It is also important that the argument was made that CSS is not intended so much to protect copyrighted content as it is to enforce a monopoly on playback equipment manufacturing; the fact that this is not a legitimate "protection objective" under the EU directive supported the finding that it was not an effective measure. There is a [short English-language article about the case here](#).

This case may have some symbolic significance, especially by pointing out the real monopolistic purpose behind much DRM, but it is not likely to have much impact in the United States. The definition of "effective" in the DMCA seems to rest more on the intent of the copyright owner than on the observable operation of the DRM system. And two US cases have already rejected the argument that the ubiquitous availability of "keys" renders the "lock" unenforceable. But this Finnish decision may help pressure the movie industry to move away from DRM and, like the music companies, consider market solutions to their copying problem.

# File-Sharing, YouTube and the DMCA's chilling effect

*Tue, 10 Apr 2007 13:11:57, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

With a new round of litigation threats from the Recording Industry of America, there has been a lot of attention, and confusion, about what obligations internet service providers have to respond when notified of allegedly infringing activity. The phrase “take-down notice” is beginning to enter our collective vocabulary, but it is important to understand to which situations it does, or does not, apply.

The take down notice is a product of section 512(c) of the Copyright Act, added by the Digital Millenium Copyright Act of 1998, and it is applicable only when the allegedly infringing material resides on the servers owned by the internet service provider. There is substantial evidence that these notices are used by content owners to remove critical material from the web even when the claim of copyright infringement is very weak.

A recent, almost comic, contratemps between law professor Wendy Seltzer and the NFL nicely illustrates how take-down notices work. Prof. Seltzer copied and uploaded to YouTube a short section of the Super Bowl broadcast — the part where they read that overly broad copyright warning that says that even “descriptions and accounts” of the game must be authorized by the NFL — in order to illustrate the absurd claims that some copyright owners use to try to frighten people from making legitimate uses of content. The NFL promptly sent a take-down notice to YouTube, which removed the video and notified Professor Seltzer. She responded with the statutory counter-notification that asserted her posting of the video clip was fair use, and YouTube put the video back. Then the whole cycle was repeated again. The clip, restored for the second time on April 4, is still on YouTube as of today, and Prof. Seltzer has certainly made her point about how copyright assertions, and especially the DMCA take-down procedure, can have a chilling effect on legitimate expression. (See [Wendy Seltzer's blog](#) as well as the “[Chilling Effect Clearinghouse](#)”).

But when infringing material does not reside on the service providers’ own equipment (as clips in YouTube reside on Google-owned servers), then neither the take-down notice and counter-notice nor the expedited subpoena process apply. Thus, in cases of peer-to-peer file sharing, where the infringing material is only transmitted over the service provider’s network but is not stored or maintained on that network, the 512(c) procedure can not be used.

So what is the RIAA sending to universities regarding file sharing? The recent batch of letters sent to university DMCA agents, who are designated to receive take-down notices, have taken two forms. One is a “settlement offer” that is identified only by an IP address and that asks the institution to pass on to the student associated with that address. When and if the letter is passed on to the correct student, that person is told to go to a specified website and settle the claim for infringement or risk being sued. Since this procedure saves the RIAA the time and trouble of getting a subpoena to learn the identity of each student alleged to be sharing files, it is much more efficient for the RIAA; it puts the institution in the middle instead.

Some schools have responding by saying that they do not retain server logs long enough to match the dynamic IP addresses referenced in these settlement letters to the offending student, so the RIAA has added another letter, demanding that the institutions retain records in anticipation of possible litigation.

Whether or not this demand is legally enforceable is a debated issue, but many universities are complying with both letters out of concern not to leave students unaware of their risk of litigation. So now the “chilling effect” that has long been associated with the DMCA is being exploited to save time and increase settlement revenues for the recording industry.

# **“A Disgrace to the Forces of Evil”**

*Tue, 29 May 2007 10:25:35, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use]*

Although it is available from lots of sources, I can't resist adding a reference to the "[A Fair\(y\) Use Tale](#)" video to this site. This 10 minute remix video, constructed entirely from Disney cartoons, offers a very clever explanation of copyright and fair use while at the same time asserting the latter as the justification for the whole creation. It could provide a valuable resource for teaching students about copyright and fair use; its evident bias in favor of aggressive fair use provides a needed balance to the one-side educational material offered by the content industries.

The video, which was created by [Bucknell professor Eric Faden](#), is available on [YouTube](#), of course, or through the Stanford University Center for Internet and Society web site (which is the link provided above). The presence of Stanford Law School as a host site may prevent the promiscuous use of take down notices to suppress this amusing and important work; as the video itself says, Disney is notorious for using its copyright to intimidate others and Stanford may be indicating its desire to push back some against that practice.

Be sure to read the "FBI Warning" at the beginning of the video; it is not at all what we are used to seeing on commercial videos. And listen for the quote used to title this post, which is part of the explanation of fair use.



# “Policy Laundering”

*Sun, 10 Jun 2007 19:54:19, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

Speaking of international issues, at the recent copyright conference at the University of Maryland University College [Center for Intellectual Property](#), Gigi Sohn of [Public Knowledge](#) used the above phrase to describe a disturbing trend in copyright legislation. “Policy laundering” refers to the practice of negotiating bilateral trade treaties with other countries that include rules about intellectual property that are more strict than US law, then presenting the agreements to Congress as evidence that the US must change its law in order to “enable” the treaties. This use of trade agreements to force legislation without regard to whether it serves the original purpose expressed by the Constitution in its authorization of copyright and patent laws — “to promote the progress of science and useful arts” — represents an end run around the Constitution.

Concern about this practice is not merely abstract. David Nimmer, whose name represents the highest authority on US copyright, writes about the TRIPS (Trade Related Intellectual Property Rights) agreement as a similar, and successful, attempt to use trade negotiations to circumvent constitutional strictures in his book *Copyright: Sacred Text, Technology, and the DMCA*. The Hague, London, New York: Kluwer Law International (2004). And the recent (July 2003) extension of the copyright term in Mexico to life of the author plus 100 years (30 years longer than in the US) must surely raise the concern that calls for such an extension in the US for the sake of “harmony” will soon be heard.

# UT Offers Help Seeking Permissions

*Tue, 12 Jun 2007 14:35:37, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: scholarly-publishing]*

A while back we [wrote about](#) the new [database from Stanford University](#) that helps one search copyright renewal records for that period of US copyright history during which un-renewed works would pass into the public domain. Now the [Harry Ransom Humanities Research Center](#) at the University of Texas, Austin has announced [two databases](#) that will help make searching for information about “orphan works” a little easier.

The Ransom Center has offered the [WATCH database](#), which stands for “Writers, Artists and their Copyright Holders,” for some time. This database helps those seeking permission to use a copyrighted work find out who owns or administers the rights and can give the necessary permission. For example, if one searches “Rawlings” in the WATCH database one discovers the name and address of the literary trust that holds rights in Marjorie Rawlings work.

On May 29 the Center announced a [companion database — FOB, for “Firms out of Business.”](#) Here one can find publishing firms that no longer exist, have changed hands or are part of a larger company. Searching “Vintage,” for example, turns up the information that it is an imprint of Random House and that the parent was sold in 2006 to a German company called Bertelsmann AG. Tracking the subdivisions and mergers in publishing is a huge and complex task, so it is impossible for a database like FOB to be entirely complete and up-to-date, but the ability to find “successors in interest” for a defunct publisher will go a long way to reducing the burden of seeking permission.

Both these databases are valuable tools for finding rights holders. The real problem is when rights holders can not be found; when the databases come up empty. That is the real orphan works problem — works that are lost to our cultural heritage as long as they are locked up by copyright with no one to turn the key by giving permission. For that problem we need to see the orphan works legislation that was proposed last year reintroduced in Congress and passed without delay. But in the meantime the Ransom Center deserves a hat tip for the hard work it has done to make the work of all who seek copyright permissions a little easier.

# New speak v. old speak

*Thu, 28 Jun 2007 08:40:51, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

It seems to be a monthly occurrence; an editorial appears in a major news outlet advocating stricter copyright legislation and enforcement. This week it was the San Francisco Chronicle, which published on Monday an [opinion piece from two attorneys who have just launched a class action lawsuit against Google over videos posted in YouTube](#). The acquisition of YouTube by deep-pocketed Google has clearly made it a tempting target, and class actions are notoriously lucrative, especially for the attorneys, if they can get past the formidable obstacle of class certification. Authors Louis Solomon and William Hart claim to represent the interests of “large and small copyright holders whose creative works have been posted and reposted [to YouTube] without authorization.”

Solomon and Hart make a number of conclusory statements in their editorial that deserve closer scrutiny. For one thing, they repeatedly assert that YouTube’s “very business model depend[s] on the unauthorized exploitation of copyrighted material.” They say there is “no legitimate constituency” for that business model and ask, rhetorically, what Google thought was the main source of value when they bought YouTube if not “the copyrighted works of others.” All of this ignores the large number of user-created works that are posted to YouTube with explicit permission granted by the creator/user who uploads the video. Of course YouTube depends on copyrighted works created by others, but many of those creators want to have their work available in this forum; these creators are not being exploited, they are being offered an outlet for their creativity that would not otherwise be available.

By ignoring the legitimate users of YouTube, Solomon and Hart reveal that the fundamental purpose of this lawsuit, like [that filed earlier this year by Viacom against YouTube](#), is to undermine some settled legal principles. This kind of attack on new technologies dates back into the 1970s, when some movies studios sued to prevent the distribution of consumer video recorders. The Supreme Court ruled that a technology could not be suppressed if it had a “substantial non-infringing use.” YouTube obviously has such uses, but the various plaintiffs are clearly hoping that our now more business-friendly federal courts will reverse or revise that standard to give content producers stricter control over technological innovation.

Another target of the lawsuit is the “safe-harbor” provision inserted into the Copyright Act in 2000 by the DMCA to protect online service providers from liability for the actions of their consumers. The content industry is hoping that the 2005 Supreme Court decision in [MGM v. Grokster](#) offers an opportunity to reverse in the courts what Congress did by legislation and force online hosts, who are easier and wealthier targets than individuals are, to assume the risks and costs for user behavior.

Finally, Solomon and Hart assert in response to an anticipated defense that “no one has a First Amendment right to infringe” copyright. This is true as far as it goes, but it overlooks the fact that some apparent infringements are immunized by law precisely because of the danger that copyright could be used to suppress legitimate and socially desirable speech. Sections 107-122 of the Copyright Act all enact “limitations on exclusive rights” designed to allow conduct that would otherwise be infringing but which Congress believed should be protected. The Supreme Court has said that “the Framers intended copyright itself to be the engine of free expression” ([Harper and Row v. Nation Magazine, 471 U.S. 599 \(1985\)](#)), and YouTube can legitimately argue that the opportunity it offers for such expression gives it a social value that tips the copyright balance in its favor.

# A very expensive blanket

*Thu, 05 Jul 2007 08:45:39, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

Two weeks ago the [Copyright Clearance Center announced that it would offer a “blanket” license](#) to college and university campus for permission to copy and distribute copyright protected material to students. The license offers to replace the time-consuming struggle to get and pay for permissions with a single yearly bill. Unfortunately, the blanket licenses apparently will not cover all, or even most, of the material frequently used by college classes. Even more unfortunately, dependence on a blanket license will further discourage university faculty members from considering whether or not their use of specific material is fair use. Fair use, like many other rights granted by law, can atrophy if it is not exercised.

In his [current column in the Financial Times’ “New Technology Policy Forum,”](#) Duke Law Professor James Boyle makes this point succinctly and eloquently. He explains much more clearly than I can why the price tag on such a license, regardless of its monetary cost, may be much too high. His column should be read by anyone who wonders if a blanket license might relieve the uncertainties and stresses of relying on fair use. The consequences of such a decision, Boyle suggests, might in the long run be far more harmful to higher education.

# Copyright term, open access and the NIH

*Sun, 15 Jul 2007 15:42:21, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

As [reported in the Chronicle of Higher Education](#) last week, an Oxford graduate student in economics is soon to publish [a paper](#) arguing that the “optimal” term of copyright protection is just 14 years. This is vastly shorter than the current term of protection in the US, where the term is life of the author plus 70 years, or in nearly any other nation of the world. Although his conclusion may be too radical to be practical, Rufus Pollok’s calculations add some weight, if any was needed, to the argument that copyright protection has moved very far from its original goal of providing an incentive to authors to create and now nearly exclusively serves the economic interests of large commercial distributors.

Pollock bases some of his calculations on the argument that a shorter term becomes more desirable as technology makes reproduction and distribution easier. Nevertheless, it is interesting to note that the optimal term he arrives at — 14 years — was precisely the term provided by the first English copyright law, the 1709 Statute of Anne.

Even if the copyright term was vastly shorter than it now is, however, many of the arguments for open access to research and scholarship would remain just as strong. That there is great public benefit to wider access to cutting edge research, and great justice in providing taxpayers with no-toll access to the results of research for which they have already paid, are points that do not depend on the length of the copyright term. Even if the term were as short as Pollock proposes, more immediate public access would still be worthwhile pursuit; authors would still need to see that a right to open access deposit was included in their publication agreements and funders, especially government agencies, would still need to mandate such deposit whenever practical. But under our grossly over-extended term of protection, these needs are greatly amplified.

[Congress is now considering an appropriations bill](#) that includes funding for the National Institute of Health and, for the first time, would mandate that research funded by the NIH be deposited in the PubMed Central database within six months of publication. This language has clear the appropriations committee and will be considered on the House floor this week. Publishers have objected that this mandate might undermine copyrights, but this argument hardly seems convincing, since most publication agreements already allow authors to offer their own published work on the web. Authors must continue to read such agreements with great attention to be sure they retain this right, and Congress should not let this spurious argument prevent them from seeing the basic justice that demands passage of the NIH appropriations bill as it has come from committee.

Added note — The American Library Association has posted this [Action Alert](#) to assist those who would like to encourage Congress to support the NIH mandate.

# Advertisements, elitism and open access

*Thu, 26 Jul 2007 13:05:39, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

One of the joys of blogging is the opportunity to relate issues and news items that do not seem to have an obvious connection. Here the only connection is that both involve SSRN — the Social Science Research Network, an open access depository for articles in the social sciences that is a wonderful resource on policy and legal issues.

First I came across this [complaint, on a law professor's blog](#), about the presence of Google advertisements in SSRN and the odd juxtapositions those ads sometimes create with the content of the paper. Specifically, Professor Leiter reports on a paper dealing sympathetically with a recent labor dispute at a university that was framed with ads for organizations that purported to help keep campuses union-free. The author was, not surprisingly, upset that his article would become the unintended vehicle for a point of view he does not support. Prof. Leiter also mention the uncomfortable relationship some ads seem to have with his own article on religion and law.

One of the realities of open access, of course, is that someone has to pay for the server space, upkeep, and the like. SSRN has a complex funding model that includes deposit fees, institutional subscriptions and — here is the rub — advertisements. Do the advantages of open access outweigh the discomfort that advertisements accompanying scholarly work can cause? I think they do, but read on.

Another recent article in SSRN broadens the question raised by these advertisements to an issue of gatekeeping and elitism. In "[Evaluate me! Conflicted thoughts on gatekeeping and legal scholarships new age](#)," Paul Horowitz explicitly raises the question of how much open access to scholarship disrupts the traditional function of publication to certify and validate scholars and scholarship. Much open access material, of course, has already been peer-reviewed and accepted through the traditional channels of scholarship. But there is a whole new form of scholarly communications out there — informal discussion on blogs and listservs that are often the midwife of formal scholarship. Some may see this as a threat to traditional forms of evaluation and quality control; advertisements seem like a tangible reminder of that threat. But others will see informal and open web communications as a renewal of creativity and an opportunity to democratize the process of scholarship as well as its results. What do you think?

# Hybrid journals and the transition to OA

*Tue, 31 Jul 2007 10:28:23, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

When colleges and universities first started talking about scholarly communications over a decade ago, the context for those conversations was often the so-called “serials pricing crisis.” Our notions about the system of scholarly communications is now considerably broader and more inclusive now, but the problem of spiraling costs for traditional material is still with us. One of the knottiest questions is whether, and how, open access to scholarly publications might address that problem of high costs.

As many publishers develop hybrid models of journal publishing — where much of the journal content, print or digital, is still available only upon subscription but some proportion of that content is freely available online because the authors have paid a special “supply-side” fee to make their work open access — many librarians question how such supply side income will impact traditional subscription rates. The issue of how we can transition library budgets away from a focus on subscriptions toward a dual focus, where author side fees might be underwritten by the institutions, is a trick and difficult one. Subvention of such author fees is really a more efficient use of the money we spent to support scholarly communications, providing much greater access than institutional subscriptions can, but it is hard to see how we can move that very limited supply of dollars toward such subventions as long as subscription rates continue to climb.

The [recent announcement from Oxford Press](#) that they are adjusting the online-only subscription rates to their Oxford Open journals suggests a step forward toward making this difficult transition. Oxford is discounting some subscriptions to reflect the income received from its “open choice” option that lets authors pay for open access. As Heather Morrison notes in her [“Imaginary Journal of Poetic Economics” blog posting](#), this announcement illustrates one step in the “potential positive spiral in the transition to open access.”

# CCLearn

*Fri, 03 Aug 2007 07:27:08, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: open-access-and-institutional-repositories]*

The Creative Commons, the organization behind the increasingly-ubiquitous Creative Commons licenses, has recently announced the formation of a new division, [CCLearn](#). The stated goal of CCLearn is to minimize the legal, technical and social barriers that impede the sharing and reuse of educational materials.

Towards this end, one of the activities of CCLearn will be to encourage those who create educational resources to make them available free of legal and technical barriers that discourage adaptation and creative reuse. The Creative Commons license, by which creators can waive their copyright claims as long as their works are used for non-profit educational purposes, is a major tool toward creating such “open educational resources.” So a major initiative of CCLearn will be to encourage those who create education resource to employ CC license or some similar mechanism to communicate their desire to share those resources with the educational community.

Equally important, of course, is the ability to find resources that are made openly available for educational purposes. An important aspect of CCLearn will be its [Open Education Search](#), a tool that “aims to direct search engine traffic to the incredible diversity of OER repositories and communities.” This tool should make it much easier for faculty members to find resources they can use in their classes without having to worry about copyright concern. It is a frequent and bitter observation that our system of copyright law does not accommodate the needs of education very well, even as it relies on institutions of higher education for much of the material that populates that system. Careful attention as CCLearn develops its open education search tool is called for; it promises a system that could offer both a potential solution to some of these copyright problems and an immense resource for creative approaches to teaching.



# Taking a defense on the offensive

*Mon, 06 Aug 2007 18:59:17, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

Technically, copyright misuse is a defense that has been recognized in the federal courts but is not codified in our copyright law. In a misuse claim, if a copyright owner is found to be claiming more copyright protection than the law gives, that owner may be barred from enforcing any copyright protection until they stop making the exaggerated claim. Someone sued for infringement can raise the defense that the copyright owner has claimed too much and a court may find that even genuine infringement should be excused on that basis.

In a recent complaint to the Federal Trade Commission, however, a computer industry group took the copyright misuse defense and went on the offensive. The [Computer & Communications Industry Association has filed a complaint with the FTC](#) alleging that the National Football League, Major League Baseball, NBC/Universal and several other large content producers are engaging in unfair and deceptive trade practices by claiming copyright protection they are not entitled to. [One example, discussed earlier on this site](#), is the copyright warning read on sports broadcasts that claims to prohibit “accounts and descriptions of this game” without written permission from the sports organizations. In spite of this dire warning, the NFL cannot prevent a water-cooler discussion of last night’s game; accounts and descriptions of the facts of the event are fine unless they are “substantially similar” to copyrighted expression, and even repeating the words of a broadcast description may be fair use, which, by definition, is permitted without authorization.

What the CCIA essentially is complaining about is copyright misuse — exaggerated claims designed to intimidate consumers and prevent them from doing things they are perfectly free to do under the law. On offense it is called an unfair trade practice; on defense it would be copyright misuse. But whichever side of the ball we are on, the idea that copyright claims can be overstated is important; consumers and users should understand the genuine contours of copyright protection and take full advantage of the educational and creative uses that the law does permit.

Read an [Electronic Freedom Foundation blog post on the filing here](#).

For those who are interested, you can [find the complete complain here](#).

# Yale says no to an OA flavor

*Fri, 10 Aug 2007 18:15:25, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The [announcement this week](#) that Yale University will no longer maintain its membership in BioMed Central is another example of the growing pains involved as scholar publishing adapts itself to new business models and forms of distribution.

BioMed Central is an open access publisher that relies on author fees and institutional memberships to pay the cost of online publishing. The resulting 180 peer-reviewed electronic journals are freely available to all users. But open access is not free, and Yale decided to withdraw its institutional membership, which covered the fees for all articles published in BioMed Central journals by Yale authors, [because the price was getting too high](#). In one sense, this is good news for open access publishing; it means that lots of authors from this prestigious university are publishing in BioMed Central journals. Clearly quality, peer-reviewed scholarship is compatible with open access. [In its response to the news from Yale](#), BioMed Central points out that costs have risen because the journals have grown and asserts that, on a cost-per-article basis, its journals still represent good value.

Open access based on author fees is an important aspect of the movement toward new models of scholarly publishing, but it is just one model of how OA can be accomplished. The Yale decision offers a good chance to comment on the variety of publishing models with which authors and publishers are experimenting by pointing out this article on [“The Nine Flavours of Open Access Scholarship”](#) by John Willinsky, which is itself published in an open access journal. Willinsky categorizes the various flavors (his spelling is different because he is a Canadian), including the “author fees” model and the “dual mode” model practiced by the Journal of Post Graduate Medicine, which published his article. This brief article is also a good introduction to Willinsky’s superb monograph on “The Access Principle,” where he develops the economic, social and scholarly arguments for open access and also expands his list to include ten “flavours.” Yale is not happy with the economics of one particular kind of OA (although it is keeping its membership in the Public Library of Science, another important OA publisher using author’s fees), but there are many more options to experiment with.

UPDATE — Presumably BioMed Central is feeling better these days, with the [announcement](#) (August 20) that the second largest funder of biomedical research in the US, the Howard Hughes Medical Institute, has joined BMC and will pay the costs for publishing all the research articles it funds in open access form.

# Can Google inherit quality?

*Tue, 14 Aug 2007 13:01:42, ksmith12@duke.edu, [category: open-access-and-institutional-repositories, category: technologies]*

That is the question posed by Paul Duguid, a professor at UC Berkeley, the University of London and Santa Clara University, about the Google Books Project. His article, "[Inheritance and loss? A brief survey of Google Books](#)" was just published in [First Monday](#), a peer-reviewed online journal about the Internet.

Duguid's point is that the Google Books project will really outstrip most other projects to digitize cultural artifacts, making them "appear inept or inadequate." But the authority and quality of the Google project, Duguid argues, is based on a kind of inheritance from the reputation of the libraries involved. So Duguid sets out to see if Google really is the qualitative heir of Harvard and Stanford.

His results are disheartening. His search for a deliberately unconventional book, Sterne's "Tristram Shandy," returns results likely to confuse and discourage a casual reader. The first result on Google's results list, a copy from Harvard, is so badly scanned that it is virtually illegible, with words cut off by the gutter on nearly every line. Elsewhere the text fades to indecipherable scratchings. And some of Sterne's eccentricities are missing; the black page of mourning for the dead Parson Yorick simply is not included in the Google scan. When Duguid tries the second result from his search, things get worse. The first page of the scan is blank and the second page puts the reader at the end of chapter One and the beginning of chapter 2 — of the second volume. Nothing informs the reader (other than comparison with a printed text) that they have been plunged into the middle of the book.

Duguid's judgments on Google Books are harsh: the project ignores essential metadata like volume numbers, the quality of the scans are often inadequate, and sometimes editions that are best consigned to oblivion are given undeserved prominence for no discernible reason (that is his conclusion regarding the second text he found, from Stanford). Rather than inheriting quality from Harvard and Stanford, he concludes, "Google threatens not only its own reputation for quality and technological sophistication, but also those of the institutions that have allied themselves to the project."

It is true that the real value of the Google Books Project is not so much to find reading matter for people as to direct them to which books are most likely to be of help or interest to them. Few people, one presumes, will try to read "Tristram Shandy" in the Google Books format. But the failures of visual quality and metadata control threaten even the more modest view of Google Books as a giant index. Without a higher degree of quality than Duguid discovered, it is hard to argue that Google is superior in any way to a comprehensive online catalog from a major library

# Why we need to collaborate.

*Mon, 20 Aug 2007 13:08:24, ksmithl2@duke.edu, [category: scholarly-publishing, category: technologies]*

The report from [Ithaka](#) on “[University Publishing in the Digital Age](#)” is almost a month old now, but I have delayed commenting about it until I had a chance to read it thoroughly. The report’s principal author was Laura Brown, a former president of Oxford University Press USA, so it is clearly written from inside knowledge of the university publishing industry, and the report subjects the roles of both university presses and libraries to careful scrutiny in the context of the changes taking place in scholarly communications.

University presses are criticized in the report for being slow to adapt to digital media, clinging instead to traditional models of business and distribution that are rapidly becoming out-of-date. Presses have also done a poor job of aligning themselves with the academic priorities of their parent institutions and demonstrating to those institutions that publishing is itself a core function of a university. University presses, however, show important strengths in selecting and editing quality material, developing an elaborate network for credentialing scholarly work and understanding the markets for the work they publish.

These strengths and weaknesses of university presses are the mirror image of the pluses and minuses found in university libraries, according to the report. Libraries recognized the importance of digital media early on — often pulled toward that recognition by the demands of users — and have maintained a consistently mission-focused position at the center of the university enterprise. They often have done a poor job, however, at selecting and evaluating material to be placed in digital collections; such collections are likened to attics where all too frequently random and unsorted materials are found, chosen apparently for availability and lack of obstacles like copyright restrictions rather than from a sound evaluation of the “market” need.

In view of how complimentary these flaws and strengths are, the most important recommendation that the Itaka report makes is that universities need not only to “remain actively involved in publishing scholarship,” but to recognize the strategic importance of developing a comprehensive framework to support a dynamic and multi-faceted system of scholarly communications. Only an institutional vision and commitment, the report suggests, can take advantage of the collaborative possibilities suggested by its analysis.

Clearly this report has generated, and will continue to generate, lots of discussion. There are overall descriptions and assessments of the report from [Inside Higher Education](#) and the [Chronicle of Higher Education](#). Amongst the blogs, the most interesting to me have been the comments at [if:book](#) and [Media Commons](#) that point out what the report does not address — the changes that will be needed in how universities understand authority and scholarly credentialing as we move to the more flexible digital world, where work can be subjected to comment and criticism long before it is submitted for formal publication.

# Anthropological growing pains

*Fri, 24 Aug 2007 11:01:39, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Last week's announcement by the American Anthropological Association that it was moving its journals and database (AnthroSource) from the stewardship of the University of California Press to the more commercial hands of Wiley/Blackwell publishers has caused a lot of outrage and hand-wringing. There is a [comprehensive blog post about the announcement here](#) at Georgia State University and an excellent [article in Inside Higher Education here](#).

The most important point that is made by the Inside Higher Ed. article is that this news should be seen in context. Alongside the Anthropology announcement the article also notes the recent [decision by the Howard Hughes Medical Institute](#), the nation's second largest funder of bio-medical research, to join [BioMed Central](#) in order to make it even easier for the researchers it funds to place their articles in open access journals. It is tempting to see the Anthropologist's decision as unmitigated bad news, but it is really just part of the growing pains as we move toward new forms of scholarly communications.

Several possible explanations of the move to Wiley/Blackwell have been circulating. Some people see the decision as a hardening of the line against open access taken when the Association came out in opposition to the Federal Public Research Access Act (and to many of its own members who support that initiative). Others interpret this as an economic move; more money will presumably be available to pay editors and support Association activities, although it may mean that less "commercial" research gets even less attention. A third way of looking at the decision is as just another contretemps in a highly dysfunctional organization. A [blog post at Savage Minds](#) tries to sort out these different interpretations and help us see that they are not at all mutually exclusive.

All scholarly societies are facing difficult choices these days. The same economic pressures that worry libraries — spiraling costs from commercial publishers, more journal outlets every day and consolidation of the ownership of those outlets — threaten the societies that have traditionally published a great deal of their own research. Joining the march toward commercialization may not seem like the best or most far-sighted solution on the part of the AAA, but it is understandable.

Far more productive, however, given the similar situation of societies and libraries, would be cooperative innovation to find new means of disseminating scholarship. Most everyone recognizes the problems we are facing; many voices, including many within the AAA are beginning to call for all those interested in the future of scholarship to talk together and think creatively about the long term sustainability of scholarly communications. The AAA has chosen a quick and short-sighted fix that will not make the problem go away; it is hoped that more creative long-term solutions await.

# Salvos in the Copyright Wars

*Mon, 03 Sep 2007 11:20:44, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

This [diatribe against YouTube](#) recently appeared on the web site of a right wing lobbying organization with the innocuous name of “[National Legal and Policy Center](#).” They are certainly correct that lots of copyright infringement happens on YouTube, but several of their arguments deserve response.

It is always odd to see a group that says it advocates small government and free markets swing so far in favor of stronger copyright protection, which, by its nature, is government intervention to distort the market. Copyright works to keep the price of knowledge goods well above the marginal cost of production in order to provide an incentive for creation. Because it creates an artificial monopoly, it must always balance the incentive created with the harm done to free competition. The National Legal and Policy Center makes no such analysis.

Instead, they simply assert that “Internet piracy” causes losses by the film industry of \$2.3 billion. Such an estimate relies on lost “opportunity costs” and assumes that each unauthorized copy is equivalent to a lost sale — a very questionable assumption. It also neglects the other side of the equation; the potential economic and social benefits when consumers have lower-cost access to entertainment and to the “inputs” for new creativity. Not that we should encourage “free-riding,” but the economics are not as simple as these lobbyists suggest; there is no reason to assume that the price the entertainment industry wants to charge for its goods is actually the optimum price, given the artificial support of copyright law.

Finally, the article simply assumes that YouTube should be responsible for the infringing activities of its users. The current law, in fact, cuts the other way; the Digital Millennium Copyright Act provides a safe harbor for online service providers from such secondary liability in order to encourage innovation. That safe harbor, which has allowed a freedom for experimentation with fair use that has supported a wealth of new creativity, is [being challenged in court](#) by the entertainment industry. The issue is still unresolved, but once again, the desirable social balance is complex and requires careful negotiation, not mere finger pointing and accusation.

Equally simple-minded is the [new campaign \(PRISM\)](#) launched by the American Association of Publishers against public access for federally-funded research in health. The publishing industry lost in Congress earlier this year, when a mandate for public access to research funded by the National Institute of Health was included in an appropriations bill. Now they hope to reverse that loss by convincing the public that mandated access for taxpayers is “government interference.” Why it is not government interference for tax money to finance the research in the first place is not clear, except to note that publishers get a free ride on such research. The researchers, of course, are seldom paid for the articles they write based on the government-sponsored research, and publishers can charge outrageous rents to let the public see the results. Little wonder that they want to protect their golden goose. But the irony of accusing the government, which paid for the research, of wanting to free-load off the publishers, who do not, is a bit too much.

The debate on these issues is well documented by Peter Suber, [here at “Open Access News.”](#)

# Is Blogging Scholarship?

*Thu, 06 Sep 2007 14:11:07, ksmithl2@duke.edu, [category: scholarly-publishing, category: technologies]*

It certainly can be, according to Margaret Schilt in "[Is the Future of Legal Scholarship in the Blogosphere](#)," reposted in Law.com from the "Legal Times." Her article provides a very helpful thumbnail summary of the major legal blogs, but also reflects on the trend of legal scholarship toward this more informal and community-centered form of scholarship.

The recently released Ithaka report on university publishing noted that an increasing amount of scholarly communications takes place over informal channels, where the blog is becoming increasingly important. But who are legal bloggers, and do they think they are committing scholarship with their postings?

Schilt observes that most legal bloggers are not the "young turks" one might expect, but mid-career professors who have tenure. There has long been a debate whether new modes of scholarly communications will be adopted more readily by the young, to whom they may be more familiar, or the older, tenured faculty who can afford the risk. In law, apparently, it is the latter who are turning to blogs.

This is good news for shared scholarship, since this group of bloggers tends to be very familiar with traditional scholarship and able to translate that level of work to the blogosphere. Schilt makes specific mention of my favorite legal blog in this regard, [Balkinization](#), where Jack Balkin of Yale leads an in-depth discussion of current events and recent works of legal learning.

What are the benefits of blogging, as Schilt sees them? First and foremost, a blog reaches more readers than does traditional scholarship. Also, it encourages rapid feedback. Some comments may be inane, of course, but there is also the potential to open up the scholarly enterprise to participants long excluded and to make the dialogue amongst traditional participants more lively and immediate.

Interestingly, Schilt also suggests that there may be a "reputational bonus" in blogging, since it can increase name recognition amongst one's peers. Finally, she points out the value of the blog in teaching, offering a chance to encourage class discussion to continue in a public and accountable forum.

Blogs, Schilt concludes, "are where scholarly dialogue increasingly takes place." Although it looks different from the traditional journal article, and its pace is accelerated over that of conventional scholarship, the blogosphere "still looks and feels a lot like scholarly activity."

By the way, the Ithaka report mentioned above has itself become the subject of this rapid and interactive process of "peer-review." It is now available in a "[CommentPress](#)" version from The University of Michigan. This software allows the report to be read in its entirety, but also lets readers insert comments at different places. You can read as many or as few of the comments as you like, but the availability of this important report in a "2.0" version speaks volumes about the trend toward more collaborative scholarship.

# What faculty think

*Tue, 11 Sep 2007 08:26:17, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies]*

It is always dangerous to try and speculate about the opinions and attitudes of a large group, especially one of diverse as university faculty. But the [University of California's Office of Scholarly Communications](#) always produces great research, and their recent report on "Faculty Attitudes and Behaviors Regarding Scholarly Communication" is no exception. The full report can be downloaded [here](#), and a PDF of the Executive Summary and Summary of Findings is [here](#). This is solid, empirical research that can help guide attempts to reform and renew the system of disseminating scholarly research.

One of the most interesting findings in this report is the disconnect it documents between attitudes and behaviors around open access and, especially, copyright. Faculty members report a high level of concern about these issues, but very little change in behavior as a result of that concern. Most respondents, regardless of their worries or desire for change, continue to pursue conventional scholarly behaviors around research publication. These behaviors are deeply ingrained in the fabric of scholarship, so this finding isn't very surprising. But it does suggest that offering help to faculty around copyright management, as well as simple and convenient ways to deposit their work in open access repositories, is very important. When we are asking a group to change long-followed practices, we ought to make the case compelling and the changes as painless as possible.

One thing that may help with this change is the growth of informal means of scholarly communication. As blogs, wikis, and even e-mail become an increasingly ubiquitous part of the scholarly process, traditional channels of scholarship will seem less inevitable than they have before. The UC report notes that the traditional system of tenure and promotion, with its narrow view of what constitutes acceptable scholarship, is one major reason for strict allegiance to the traditional system; the proliferation of informal channels of communication, rather than "external" pressure, seems the most likely way to open up that view of scholarship. It is to be hoped that the value for a more open and informal way of evaluating and improving scholarship will make traditional channels, as valuable as they are, no longer the only option for perceiving quality work.

Another interesting finding of the report is that "senior faculty may be the most fertile targets for innovation in scholarly communications." For many this seems counter-intuitive, although the [report on legal scholarship discussed in our last post](#) indicated the same possibility. While younger faculty may be more comfortable with technology (although that is by no means certain), it is senior faculty, the UC report suggests, who can afford to experiment, since tenure makes experimentation much lower risk. Is it possible that another explanation of this finding is that senior faculty, with their years of experience in traditional scholarly publishing, have reached a level of frustration that makes them embrace new alternatives more quickly?



# Copyright & the First Amendment

Fri, 07 Sep 2007 09:06:24, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]

Copyright blogs have been very active over a [decision handed down in \*Golan v. Gonzalez\* by the Tenth Circuit Court of Appeals](#) on September 4th. This is the most recent in a line of challenges to the Copyright Term Extension Act of 1998 (CTEA) that added twenty years to the duration of copyrights in the US. The argument that this was unconstitutional because the constitution only allows patents and copyrights for “limited times” has failed several times in federal court, and it failed here as well. But a new twist is introduced in this case that promises a great deal of debate.

See these blog posts by [William Patry](#), [Jack Balkin](#), [Larry Lessig](#) and [Carlos Ovalle](#). Balkin’s post, which suggests some pitfalls to the First Amendment challenge described below and suggests that it is really the DMCA that should be subject to such a challenge, is especially worth reading.

In addition to challenging the CTEA, plaintiffs in this case also challenged the law that implemented the “Uruguay Round” of trade agreements in the US. This round of negotiations led to a revolutionary marriage of trade regulation and international intellectual property law, and it finally brought the US into the Berne Convention, a hundred-year-old international agreement on copyright. In order to implement that agreement in the US, Congress passed several major amendments to make our copyright law conform to the international minimum standards.

One change, in 1989, was to entirely eliminate “formalities” for copyright, the need to put a copyright symbol on a work or to register it before it was protected by copyright. In essence, copyright protection became automatic. The other Berne convention countries had done away with formalities long ago, so there were works published in those countries that were protected by copyright at home but were in the public domain in the US because they had not complied with our formal requirements. These foreign works were restored to copyright protection by the 1994 implementation act challenged in this case.

In 2003, the Supreme Court ruled, in *Eldred v. Ashcroft*, that the CTEA was not unconstitutional. They also said, however, that First Amendment free speech rights might be implicated by a copyright law revision if that revision “altered the traditional contours of copyright.” That phrase is spawning a great deal of litigation, and in *Golan v. Gonzalez* the Tenth Circuit held that the restoration of copyright in those foreign works that had been in the public domain was an alteration of these traditional contours. On that basis, it sent the case back to the district court to decide if free speech rights really were implicated here, requiring that the government meet a much higher standard in defending the law.

I have to agree with [William Patry’s blog post](#) that there is something very strange about this decision. The “remand” to the district court is essentially to decide what standard of review to apply to the case. But the Court of Appeals has already decided, earlier in the opinion, that Congress was acting within its constitutional authority when it passed the Uruguay implementation act. The Tenth Circuit seems to say that Congress had the authority to restore these copyrights under the constitutional authority granted in the patent and copyright clause but that the action may still be challenged, based on a higher standard of review, under the First Amendment. Since the Supreme Court has already said that the First Amendment safeguards built into copyright law — notably the idea/expression dichotomy and fair use — are sufficient to reconcile the grant of copyright authority with the free speech clause, it is hard to see where this argument can go. The Tenth Circuit explicitly disagreed with the Supremes on this point, but it seems unlikely that that alone will change the high court’s mind. Besides, it seems unlikely to me that the district court will actually apply the higher level of review to this law, since to do so it would

have to find that the copyright restoration act was a “content-based” restriction on free speech, which it clearly is not.

All of this, to my mind, obscures the real point about the restoration of foreign copyrights. The significant alteration of the traditional contours of copyright occurred back in 1989 when the US dropped formalities. Suddenly, copyright protection became the default position, whereas previously authors could decide to protect their work, by complying with the formalities, or place it in the public domain. Once we made the decision to abandon formalities, the public domain was severely restricted. Restoring a small number of foreign copyrights so that non-US authors would not continue to be penalized by rules we had abandoned for ourselves seems a reasonable act of equity. We should be having a much broader debate about the “traditional contours of copyright law,” and the importance of the public domain to scholarship, creativity and innovation. That debate will not be resolved by the courts; it must take place in public and in Congress.

# When should the government intervene?

*Thu, 13 Sep 2007 10:23:09, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

There has not been a lot of comment on this site about the launch of [PRISM \(The Partnership for Research Integrity in Science & Medicine\)](#) — a coalition of publishing organizations that is campaigning against the proposals in Congress to require public access to federally-funded research. One reason for this lack of comment is that the actual arguments and assertions made by PRISM are so transparent and easily refuted; I called them simple-minded in an earlier post ([here](#)), and I have seen nothing that changes that judgment. Also, lots of other blogs and listservs have dealt extensively with the claims of PRISM, especially after the Director of Columbia University Press resigned from the Executive Council of the American Association of Publishers over its support of the Partnership and the Director of Cambridge University Press wrote a letter repudiating its absurd assertions (see [news item in The Chronicle of Higher Education here](#)).

But even a silly debate can produce significant points, and one of the most important contributions to this argument comes from William Patry, senior copyright counsel for Google, whose [blog](#) has been cited here several times before. The “PRISM principles” refer repeatedly to preventing “government intervention” in scientific research. The irony of complaining of government interference in research that is paid for from federal tax monies in the first place should be pretty obvious, but Patry adds another point that is worth our attention. As he says [in this post, “Copyright is always Government Intervention.”](#) By definition, copyright is a government-granted monopoly that artificially supports the price of intellectual property to provide an incentive to creation. Patry nicely explains the logic behind this government intervention and the reasoning that underlies the attempt to create a balance between incentives for creators and opportunities for users.

However one feels about whether we have struck the appropriate balance in the US or have erred to one side or the other, most will agree that the economic rationale for copyright as a government intervention in the free market is sound. We can only wonder if PRISM, however, will be true to its professed disdain for government measures and support the total abolition of copyright. Such a change would create a genuinely free market, where publishers would be free to compete with each other by publishing the same works at competitive prices; consumers would likely benefit from lower prices for books and movies, but it is pretty certain that creativity would suffer in the long run.

# A big footprint

Thu, 20 Sep 2007 07:34:53, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

The Computer & Communications Industry Association, which has recently grabbed some headlines with its [complaint to the Federal Communications Commission](#) about misleading and over-broad copyright warnings, has just released a [report it commissioned on "Fair Use in the U.S. Economy."](#) The purpose of this report is to "measure the footprint of fair use on the U.S. economy," and its conclusion is startling. Industries that benefit substantially from fair use, says the report, employ over 10 million people and account for about one-sixth of the total U.S. GNP. That is a big footprint!

The PDF of the full report is available [here](#).

In the past [I have objected to claims](#) made by the copyright industry about the amount of money lost through unauthorized file sharing or piracy. Those figures, I have suggested, are over-inflated and conjectural because they rely on lost opportunity costs and do not account for the economic benefits that might be gained from these activities. Now that the CCIA has decided to look at the economic equation from the other end and examine what benefits fair use (legal uses, as opposed to piracy and file-sharing) provides to the economy, it seems fair to ask how reliable its figures are.

The study, which was done by consultants from Capital Trade, a firm specializing in consulting and analysis of international trade, identifies "core industries" that "derive a significant amount of their current business from the demand generated by fair use and the Internet." It is hard to argue that search engines, for example, have fair use at the center of their business. Other sectors, like consumer electronics, certainly are dependent on fair use, but one could argue that both purchased content and "pirated" content reduce the share of that industry that is dependent on fair use. Education, in this report, is also apparently identified as a core industry, since it depends heavily on the non-copyrightability of facts as well as other fair use freedoms. Other non-core sectors are also examined when their businesses "facilitate the output of the fair use core." The identification of these industries and the measures used to evaluate their economic impact, are based on the WIPO recommendations for studying the role of knowledge industries in the world economy.

In so far as its conclusions are understood to show the economic impact of industries that would be significantly harmed by a narrowing of fair use, it seems a careful and clearly defensible effort to remind us that usability of information is as important to our economy as is its creation. Without fair use, many of these industries would not go away altogether, but they would be badly hampered and would contribute much less to the U.S. economy. We have heard so much about the important economic impact of the industries that create copyrighted content; it seems like a vital counter-balance to consider the impact of those industries that benefit from the legal, unlicensed use of that content.

# Friday's good news

*Mon, 23 Jul 2007 14:04:38, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

Last Friday was a day of both good news and bad news for higher education on the copyright front.

On the plus side, on Friday we learned that the House of Representatives passed, late Thursday night, a Labor, Health and Human Services and Education appropriations bill that included language to make the public access policy for the National Institute of Health mandatory. What this means is that the published results of research funded by NIH grant monies would have to be made available to the public, whose tax dollars paid for the research, within one year of publication. The NIH offers the [PubMed Central database](#) for this purpose, and a small amount of research (compared to the total amount funded) has been made available under a voluntary program for the past three years. A mandatory policy will vastly increase public access to vital health information; the 12 month delay would ensure that subscriptions to the journals that publish these original articles would not be endangered.

This was only a small provision in a huge appropriations bill, but it is the first time a full branch of Congress has endorsed the principle of public access. Publishers lobbied hard against the change, for reasons that are hard to fathom (note — [here is an article in which several representatives of the content industry express the reasons for their opposition](#)), but Congress specifically passed over the opportunity to amend this provision. A similar bill, with the open access proviso, will soon be considered in the Senate. President Bush has threatened to veto the Appropriations bill because of disagreement over the amount of spending — not because of the public access rule — so it may be sometime before this mandate goes into effect. Nevertheless, a very significant first hurdle has been successfully cleared.

See a [news release from the Alliance for Taxpayer Access here](#).

Our next post will discuss Friday's bad news.

# Friday's bad news

*Tue, 24 Jul 2007 12:56:11, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

UPDATE — What a difference a weekend makes! According to the [Chronicle of Higher Education today](#) (Wednesday), Senator Reid has withdrawn the proposed amendment after intense lobbying from the high ed. community. The issue, of course, has not gone away, and lawmakers seem determined to continue to pressure universities as if they were the primary source of this problem, which they are not. But at least this very bad idea has been abandoned for now.

The down side of the news on Friday was an announcement, and an [urgent appeal for action, from EDUCAUSE](#), about the intention of Senator Harry Reid to offer an amendment to the Higher Education Reauthorization Act that would put a grossly unfair burden on a few universities to address illegal file sharing; a burden no other online service provider would share.

Senator Reid's amendment (there is a [report on it here from the Chronicle of Higher Education](#)) would require that 25 institutions identified each year by the music industry to the Secretary of Education, based on the number of copyright infringement notices sent to those schools, adopt a "technology-based deterrent to prevent the illegal downloading or peer-to-peer distribution of intellectual property." Now, everyone agrees that sharing copyright protected music and video over P2P networks is illegal and ought to be discouraged, but this amendment is clearly the wrong way to approach the problem.

First, colleges and universities are only a small part of the file-sharing problem. Even the content industries admit that nearly 3/4 of all file sharing takes place over commercial networks not affiliated with higher education. In fact, the higher education community is the only major group of online service providers that is now actively taking steps to reduce file-sharing on its networks. Why punish only those who are trying to prevent the activity and ignore the commercial providers? Why do the content industries continue to target higher ed and ignore AOL and Viacom, where the problem is much greater?

Second, the Secretary of Education is supposed to identify the 25 schools from information provided by the content industries. Thus a major financial burden could be created for institutions that have little way to anticipate being targeted or defend themselves from random selection. These notices are often inaccurate, and just counting them up and picking out the top recipients is and unfair, and unfunded, mandate that will do little to actually address the problem.

Finally, this proposal continues the trend in Congress of attempting to apply technological solutions to infringement problems. Unfortunately, every technological barrier quickly becomes a challenge that some programming whiz wants to defeat. The barriers fall as quickly as they are erected. So schools would be required to spend lots of money to implement solutions that can not realistically be expected to work for very long. These problems must be addressed with long-term market solutions, not with technological band-aids.

You can read a [letter from EDUCAUSE](#) about the proposed amendment [here](#), and an [article from Inside Higher Ed here](#). As the article notes, this amendment has not been offered yet, and the situation is "fluid." So perhaps good sense will prevail on this issue, and troubling news can become an opportunity to educate our Congressman on the real facts about file sharing.

# Student rights and academic values

*Fri, 21 Sep 2007 15:23:37, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation]*

Do students own the copyright in the works they create as part of their education? Generally the answer is yes, but we have recently been reminded of some troubling exceptions. The University of Hawaii's "Academy of Creative Media" is a film school that insists that all of its students completely assign their copyright in all of their works to the school. The Electronic Frontier Foundation has a [story about this rule here](#), and they include links to several other comments, as well as to the Hawaiian Academy's agreement and an FAQ they use to justify the practice. It also links to a story about a similar policy at the University of Southern California.

Student rights are often ignored on college campuses, perhaps because of long-standing practices that stretch back to before copyright vested automatically when an author fixed her work. But we need to deal seriously with student rights, especially now that digital networks give us so much flexibility for making class works available to the public. There are real pedagogical advantages to having students work for a larger audience, but there are also opportunities to abuse the rights students now have from the moment their works are fixed in a tangible medium. Part of learning how to use these new technologies is developing policies that respect those rights.

The policies of the University of Hawaii and USC undermine the respect students deserve. Even more startling is the justification found in Hawaii's FAQ — that this policy is consistent with the University's claim that most faculty works are also works made for hire. Most universities do not claim ownership of faculty works, even though there is a stronger argument for that claim than for demanding rights in student works. Courts have even suggested that the work for hire rules do not apply to faculty writings, although those rulings are old and in doubt. To claim student copyrights, however, these two universities can't even rely on work for hire; they need to compel students to sign an agreement that gives the copyright to the school.

Does the proximity of these schools to Hollywood justify their grab of student rights? As one commentator points out, at the very least, students who are subjected to these avaricious and rigid policies will be better prepared to work in the commercial film industry. These seems like a clash between academic values, which, contrary to what some in the content industries claim, usually try to teach respect for rights in creative works, and commercial values that see creators' rights as one more commodity to be acquired as cheaply as possible.

# Keeping your copyright

*Tue, 02 Oct 2007 14:35:10, ksmithl2@duke.edu, [category: authors-rights, category: scholarly-publishing]*

There is a [great new website](#) to help those who create stuff — whether they are filmmakers, musicians or academic authors — understand and manage their copyrights. [Several groups at Columbia University law school](#), working with a [Board of Advisors](#), have created the site to walk creators through the rights they have, how they can manage those rights to accomplish their personal goals for their work, and even the common terms found in many publication contracts. The need for this website is summed up very well in its first paragraph:

“Today, too many creators take a passive attitude toward their copyrights. The matter seems complex, and publishers or distributors may tell you that everyone does it their way, or that giving up copyrights is standard practice. But giving up your rights under copyright is a decision, not a default option. If you stand passively by, you may over the course of a long creative career produce a large body of work, most of which is owned and controlled by other people, whose interests and yours may diverge.”

Academic authors and creators should take these words to heart and use this website to develop a proactive strategy for managing the rights they have in the works they create. The vast array of options now available for sharing and exploiting one’s own creative work suggest that passivity is no longer a sensible option, and the information offered by this site is exactly the remedy needed.



# A Civil Debate about Open Access

Thu, 04 Oct 2007 09:00:59, ksmith12@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]

Looking at these two articles about open access and scholarly publishing has made me aware of an online (and open access) journal that I did not know about before, [“Script-ed” is the online journal of the Research Centre for Studies in Intellectual Property and Technology](#). If these two articles, and the titles of others I have yet to read, are an accurate measure, this is an excellent publication for all interested in “law and technologies in the broadest sense.”

The two articles I want to recommend here are about the cost of open access to publishers, who fear loss of revenue if OA were to become the norm in the academic world, versus the social costs of continuing as things are, where fewer and fewer people have access to significant research as the toll for access to subscription journals rises.

From the [perspective of an academic publisher, Kevin Taylor’s article](#) is a calm and reasonable account of the current situation. He recommends, and apparently practices at Cambridge University Press, where he is IP Director, sensible and even enlightened copyright policies for academic publishing. It is only when he talks specifically about open access that he raises some fears that are not very well-founded.

In his [response to Taylor’s article, A.A. Adams carefully refutes these fears](#) and offers a font of helpful information about open access. Perhaps his most important point is that book publishing in the academic world is very different than the business of publishing journal articles. Academic authors do not write articles to gain direct economic benefit, which makes OA an important and entirely beneficial option in the world of articles, where it might be more contested if we were talking about monographs.

Adams’ section on “Routes to Open Access” is a superb introduction to the arcane jargon of the OA movement, explaining very clearly what green and gold OA are and how the various versions of these two “roads” to OA can work.

# Copyright widgets

*Thu, 11 Oct 2007 13:57:57, ksmithl2@duke.edu, [category: notes]*

A colleague recently suggested the value of putting out short tidbits of information about copyright on a regular basis as a way to educate a community and keep attention focused on copyright issues and opportunities. It seemed like such a good idea that this site will begin carrying such short information briefs (called widgets in honor of my colleague's affection for that word) each Thursday (I hope).

All of this site is placed under a Creative Commons license (Attribution, non-commercial, no derivative works), but it seems appropriate to explicitly offer these informational widgets for reposting to other academic communities if they seem helpful.

These widgets will be collected under the more descriptive blog category of "copyright information notes," with the hope that they will cumulate into a helpful review.

# What does Copyright protect? Our first widget.

*Thu, 11 Oct 2007 14:05:45, ksmith12@duke.edu, [category: notes]*

Copyright protects original expression in fixed form. “Original” means there must be some element of “authorship,” but the standard here is very low. A phone book is not sufficiently original, but my grocery list probably is. “Fixed” means that the expression must be available in a medium that can be perceived; unrecorded oral expression is not protected. Most importantly, “expression” means that copyright does not protect ideas, only the form in which those ideas are expressed. I am free to use ideas gained from another’s work in my own original expression without authorization.

# Who gets copyright in a work? (weekly widget)

*Thu, 18 Oct 2007 05:16:43, ksmith12@duke.edu, [category: notes]*

Copyright is automatic whenever a work of original authorship is fixed. No notice (like the symbol ©) or registration is required anymore. The copyright is owned immediately by the person who created the work, who retains ownership unless and until they transfer some or all of the copyright to another. The exception is a work made for hire, where the employer rather than the creator is the immediate owner of the copyright.

# When is something a work for hire? (weekly widget)

*Thu, 25 Oct 2007 08:00:04, ksmith12@duke.edu, [category: notes]*

A work is “made for hire,” so that the employer owns the copyright from the beginning, if the work was created “by an employee within the scope of his or her employment” or if a work by an independent contractor is subject to an express agreement that it will be work for hire and it falls into one of nine broad categories listed in the Copyright Act. Many works created by college and university faculty would seem to be works for hire under the first prong of this definition, but there is a long judicial tradition of excluding these works from the category. Many universities have adopted policies to address when a faculty work is or is not a work made for hire.

# Fixing the DMCA?

*Mon, 15 Oct 2007 09:32:15, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management, category: technologies]*

The Digital Millennium Copyright Act added two important sections to the copyright act, one that has proved somewhat useful in fostering fair use and the balance between owner's and user's rights, and one that, in stark contrast, threatens to drastically overturn that carefully crafted balance. The "safe harbor" provided for online service providers has assisted the growth of web 2.0 applications that offer an unprecedented opportunity for user creativity that pushes the boundaries of fair use. The strict protection of electronic protection measures (anti-circumvention rules), on the other hand, has arguably given content producers the means to control each and every use of their content, forbidding any uses they wish to prevent, even if those uses would otherwise be privileged under the rest of the copyright law.

A new article by Professors Riechman, Dinwoodie and Samuelson, available [here on the Social Science Research Network](#) and forthcoming in the Berkeley Technology Law Journal, examines these two provisions carefully, in the context of their origins in the World Intellectual Property Organization Copyright Treaty and the US Congress, as well as the important interpretation of each in the courts. The professors find in the development of the safe harbor "notice and takedown" mechanism that has successfully protected OSPs a fascinating suggestion for how to fix the clearly dysfunctional anti-circumvention rules.

It is difficult to summarize an article this complex, although the clear writing and argumentation in this piece makes it far easier than many other law journal articles to comprehend. The authors examine the way the concern of the US courts, starting with the famous Sony Betamax case before the Supreme Court in 1984, to protect so-called "dual-use" technologies (those capable of both infringing and non-infringing uses) so that copyright law not be allowed to stifle technological innovation, laid the groundwork for the safe-harbor provision of the DMCA. Building an elaborate analogy between these cases and the situations in which the anti-circumvention rules would come into play, the three professors suggest that, in the US (the article also deals with the European Community), courts could begin fashioning a similar solution to the over-protection of copyrighted works fostered by technological protection measures. In short, they propose a "reverse notice and takedown" procedure which would obligate content producers to "unlock" technological protection when necessary to foster uses privileged by the law as in the public interest. They discuss in detail how such a procedure make be established in both the US and the EC, and what the details of such a solution might look like.

Although long and complicated, with its treatment of both the US and the EC, this article richly rewards the time spent reading it. It provides a clear summary of where we are vis-à-vis the uneasy relationship between copyright and the digital environment, how we got to this point and how we might move forward in a responsible way. Scholarly work seems to get more attention from European courts and legislators than it does in the US, but this is one article that we must hope catches the attention of some well-placed American jurists who could consider implementing its creative solution to a problem that has rapidly become intolerable.

# How long does copyright last? (weekly widget, a little late)

*Sun, 11 Nov 2007 09:00:11, ksmithl2@duke.edu, [category: notes]*

The original term of copyright protection in England was 14 years. In the US it began, in 1790, at, potentially, 28 years (a 14 year term that could be renewed once), then went to a system of two terms of 28 years, so that a renewed copyright lasted for 56 years. In 1976 we changed our law dramatically. Copyright became automatic as soon as a work was “fixed in tangible form,” and the copyright term was based on the life of the author. After another term extension in 1998, copyright in the US now lasts for the life of the author plus 70 years. For works created anonymously, as works for hire, or by a corporate author the term is 95 years from first publication or 120 years from creation, whichever is shorter. These changes mean that the public domain is barely growing at all in the US, since everything is protected automatically and it is now protected for a very long time.

# Flipping out

*Mon, 22 Oct 2007 07:34:27, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Can it really be this easy? I have written several times about the difficulty of transitions from the increasingly unworkable subscription model for academic journal access to an open access model with some alternative form of financing. Now [Peter Suber has developed an idea](#) suggested in 2003 by Mark Rowse, who was CEO of Ingenta at the time, which offers an elegant mechanism for that transition.

Rowse's suggestion is simply that a journal "flip" its business model by declaring that, from now on, what have previously been regarded as library subscription fees will now be considered authors' subsidies and the contents of the journal will be available without barriers on the web. Such a decision would protect the journal's income in the short run, and it would challenge subscribing libraries to refrain from canceling their payments to the journal, now identified as author's fees, until a sustainable model to keep the contents available in open access is developed. Such a model would presumably involve incremental steps towards correlating what an institution actually pays with the publishing habits of its faculty in the journal. Some schools would pay less, some would pay more, and some that did not pay the high subscription rate at all would be convinced, one hopes, to pay appropriate fees for publishing their own faculty's work.

This idea obviously involves a risk on the part of both the publisher and the libraries, but it seems like an excellent way to prod libraries into putting their money where their mouths are in regard to open access. As Rowse says, this technique suggests a way to transition to open access "without fundamentally destroying the existing scholarly publishing business."

In addition to Suber's article linked above, more comment can be found in this [blog post by Heather Morrison](#).

Just for some context, this [article about the decision of the Max Plank Society](#) to cancel all of its electronic access to the 1,200 scientific publications from Springer Publishing due to the failure of negotiations for an acceptable price is another reminder that the current model is failing at the fundamental goal of facilitating scholarly communications. The kind of imagination and courage that could make Rowse's suggestion work is sorely needed.



# So what is in the public domain? (weekly widget)

*Thu, 15 Nov 2007 09:52:37, ksmith12@duke.edu, [category: notes]*

The public domain, according to Duke's [Center for the Study of the Public Domain](#), "is the realm of material—ideas, images, sounds, discoveries, facts, texts—that is unprotected by intellectual property rights and free for all to use or build upon." In the United States, anything that was published before 1923 is in the public domain. Works published between 1923 and 1963 may be in the public domain, if they were published without notice (the symbol (c) with a date and name), or if the original copyright was not renewed after the first term of 28 years. It is often difficult to be certain about this, although the [database of renewal records made available by Stanford University](#) is a big help. Government works — works created by government employees (but not necessarily independent contractors working for the government) — are also in the public domain because the copyright law does not allow an initial claim of protection in such works. Works published with a [Creative Commons license](#) may also be in the public domain, although usually they are partially protected by copyright but available for non-profit reuse. Unpublished works are in the public domain if the author died over 70 years ago. It is important to note that all of these rules have some additional complexities; this [chart by Peter Hirtle](#) is very useful for sorting out the intricacies of copyright terms.

Most importantly, facts and ideas are in the public domain, since copyright only protects expression. Patents, however, do protect ideas, so the idea of a patented invention is not free for others to use without a license, while ideas contained in copyrighted expression are.

# NIH public access and copyright

*Wed, 31 Oct 2007 08:40:22, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Last Tuesday the Senate passed a FY 2008 appropriations bill that included language making it mandatory for investigators funded by the National Institute of Health to place the published versions of their results in the open access PubMed Central database within one year of publication. There is a new release about the policy, which was passed by the House in July, [here from the Alliance for Taxpayer Access](#).

A consultant for publishing groups recently posted several questions about how the policy relates to authors' copyrights on a library listserv, intended to convince academic authors that the policy is some kind of threat to them. By responding to those questions below, I hope to clarify the real relation between this new mandate and author's rights.

The first question was whether supporters of the NIH mandate believe authors should own their copyrights, including the right to charge for their work. In my opinion, an author should have ownership rights in their own work. I also recognize that the unique nature of intellectual property means that those rights have to be subject to limitations and exceptions in the public interest. Every copyright law in the world, and all of the international treaties, recognize and allow for such limitations and exceptions, so this is not a radical proposition. In any case, the NIH policy is not a threat or challenge to copyright ownership. In fact, the explicit language of the provision passed last week requires that the mandate be implemented in a way consistent with an author's ownership of copyright.

All that the NIH mandate requires is that authors give to the NIH a non-exclusive right to distribute their work no later than one year after it is published. This demand is a much more modest limitation on authorial rights than is the complete transfer of copyright still demanded by many publishers as a precondition of publication. There is no evidence that this delayed and non-exclusive license would harm an author's ability to charge for her work, although that part of the copyright has little application in the world of academic authorship. On the other hand, there is evidence that public access as soon as possible will benefit an author's reputation, which is the real value academic authors are able to extract from their copyright ownership.

The second question was whether supporters of NIH deposit believe that authors should have the right to transfer their rights by contract. Again, I support that right very strongly; I spend a good deal of my time advising academic authors about how to accomplish these transfers in a thoughtful manner that benefits them, not just the other party to the transfer. Again, the NIH policy will not impair the ability to do this, it will simply make such contracts subject to the non-exclusive license described above. Governments often put restrictions and requirements on the contents of contracts; it would be absurd to claim that the Uniform Commercial code has seriously impeded a manufacturer's ability to sell his goods, even though contracts for sale are much more heavily regulated than a publication contract is, even after the NIH mandate.

One must remember that deposit in PubMed Central will not be required until one year after publication, so there is lots of room to negotiate the exact terms by which that non-exclusive license will be implemented. I will certainly advise authors to negotiate for earlier deposit, since it will be to their benefit to do so.

Finally, supporters were challenged about whether they believe academic work is “work for hire” that is owned by their employing universities, and whether they also felt other faculty work, like inventions, should belong to the school. It seems to me that academic work should not be work for hire, although I recognize the strong legal basis on which some universities claim that it is. My preference is for clear policies that leave academic ownership of copyright in the authors’ hands. But again, the NIH policy has nothing to do with work for hire; it certainly does not involve any claim that funding of research makes a work a work made for hire. Such a claim would be insupportable under our current definition of work for hire.

When something is a work for hire, the ownership of the copyrights vests immediately with the employer. In contrast, the NIH is only requiring, again, a non-exclusive license to distribute which will not have to come into being until well more than a year after the copyright vests in the author.

As for other types of intellectual property, I would note that many academics are not uncomfortable with a work for hire claim over patentable inventions because they recognize that university resources are much more involved in such creations and that the assistance of the university is needed to pursue the complex and expensive process of obtaining a patent. Copyright protection is very different in its origination and its terms, so it is quite rightly treated differently.

Responding to these challenges helped me clarify for myself that the real threat to authors’ copyrights is not the NIH public access policy, but an outdated approach to publishing that tries to build an exclusive market around a non-competitive good (which means a good that can be distributed widely without diminishing its supply or value to the creator).

# Talk back on schol comm issues

*Sun, 28 Oct 2007 08:37:24, ksmithl2@duke.edu, [category: scholarly-publishing, category: technologies]*

Two interesting scholars have recently undertaken to write major pieces of scholarship about scholarly communications issues in blog form. This means that all of us have the opportunity to comment on these works in progress, a rare opportunity to participate in cutting edge research and to make our voices heard before a work of scholarship is published. Not only are these two projects interesting because of their topics, they also represent important experiments in the kind of collaborative scholarship that the digital environment makes possible.

Georgia Harper, well-known in copyright circles for her years of work in the Counsel's Office at the University of Texas and her educational outreach to the whole academic community, is now a Ph.D. student in Library and Information Science. She is working on a major paper on the impact of mass digitization projects on copyright law and policy. Her work should be fascinating, and we are invited to participate as she develops the paper and solicits feedback [at this blog site using CommentPress](#) software and in collaboration with the [Institute for the Future of the Book](#).

The growing influence of the Institute for the Future of the Book in these new experiments in collaborative scholarship is evident from the fact that the other project, [Siva Vaidhyanathan's growing book on "The Googlization of Everything,"](#) is also a project of if:book. Vaidhyanathan's project promises to be the more synoptic and polemic of the two as he tells us why we should worry that "one company is disrupting culture, commerce and community." Combined with Georgia's deep knowledge and experience in law and policy, these two projects offer a rich set of opportunities to imagine the future of publishing and scholarship.

# What are the rights protected by copyright?

## (weekly widget)

*Thu, 01 Nov 2007 08:23:27, ksmithl2@duke.edu, [category: notes]*

Copyright is a set of exclusive rights. By exclusive we mean that the owner of the rights has the sole authority to permit or forbid covered activities. There are five basic things that a copyright holder can authorize or prevent — reproduction, meaning making copies of her work; distribution of the work; public performance of the work; public display of the work and the preparation of derivative works. A derivative work is a work based on the original, like a translation or a film adaptation. All of these rights can be sold or transferred to others, and they can be divided up and sold to different parties.

It is important to note what rights are not given to the copyright holder. They do not have the ability to prevent private displays or performances, for example. Most importantly, there is no right to authorize or prevent **uses** of the work, as there is in patent law. A user is permitted to make use of a work they acquire without further permission as long as they do not copy it, make a derivative work, or offer a public performance or display. A user is also permitted to distribute the legally acquired copy of the work as they see fit.

# Second thoughts

*Mon, 05 Nov 2007 09:58:28, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: technologies]*

**On Google** — the New Yorker has a [learned and fascinating article on the Google Library project](#) this month, by historian Anthony Grafton. The Google project has gotten inordinate praise in some quarters, as well as its share of criticism (see [here](#), for my contribution to the latter). But Grafton's article is neither wholly critical nor wholly laudatory; his is an attempt to place Google in the history of efforts at building a universal library and to realistically assess what can actually be accomplished. He points out that a truly comprehensive history of humanity, which some have claimed Google will provide, will still remain out of reach. For example, much "gray" literature and archival material will never see the light of scanning, nor will the cultural production of many of the world's poorest countries.

This latter point is especially troubling. Poor countries are not just consumers of cultural production, they do also produce it. The digitization of so much western/northern literature could have two negative effects on this production. One would be to push developing world literature further to the margins in the developed world. The other is that, in so far as technology is available within those developing countries, the easy access to material through Google could marginalize a country's own cultural production even within its borders.

Nevertheless, Grafton is properly amazed at the level of access that digitization has made possible. As he says, picking up his opening theme, "Even [Alfred] Kazin's democratic imagination could not have envisaged the hordes of the Web's actual and potential users, many of whom will read material that would have been all but inaccessible to them a generation ago." Digitization offers great things, but a realistic valuation of those benefits recognizes that no single means of access should replace all the others; the Internet will continue to coexist with libraries, archives and whatever the future holds that we can not yet imagine; all will be part of any genuinely comprehensive look at human history.

**On Second Life** — On a less exalted plane, the New York Post reported last week on a [law suit filed by and against Second Life entrepreneurs](#) alleging copyright infringement of products designed and sold entirely within the virtual environment. See another comment on the lawsuit [here](#). As the comment points out, many educators are looking closely to consider the educational potential of Second Life or other virtual worlds. This lawsuit raises some interesting questions that will need to be answered in order to exploit that potential. For example, do real world laws protecting the rights of creators even apply to Second Life? Is copying someone else's design in Second Life stealing, as the plaintiffs allege, or is it merely part of a giant "video game" that should not have real world legal consequences? The answer to that question should be a prerequisite to placing educational content into Second Life; teachers typically want to protect the content they produce, or at least share it on their own terms. Whether Second Life will be subject to real world laws, intra-world regulation amongst its members, or merely arbitrary decisions enforced by Linden Labs, its owner, will have a profound impact on how much time, money and content educators are likely to invest in Second Life.

Interestingly, the same defendant who argues that Second Life is a giant video game in which real world laws should not apply also claims that his home in Second Life was subject to an illegal search and seizure by the plaintiffs when they entered to photograph the allegedly infringing items. Just goes to show how hard it is for us to escape our real world notions of property and privacy.

# To Assign or Not To Assign?

*Tue, 06 Nov 2007 21:05:01, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

The International Association of Scientific, technical and Medical Publishers issued a statement last month on the [benefits to authors of assigning copyright to publishers](#). The thrust of the statement is that publishers are better placed than authors to defend against plagiarism and copyright infringement, to ensure broad dissemination of the articles in question, and to manage issues like requests to reprint and migration to new formats. Each of these points is very debatable, and [Peter Suber provides both excerpts of the document \(which is itself very short\) and a comment that refutes](#) the assertions list above in a very concise and competent way. Not surprisingly, his conclusion is that publishers primary concern is to protect their own interests and that a concern for authors' rights is, at best, secondary.

One point on which Suber and the STM publishers agree is that a complete assignment of copyright need not preclude authors from making their work available in open access through a personal webpage, institutional repository or disciplinary archive. Even when faced with a demand to assign the copyright, authors may negotiate to retain the right to deposit their work in the ways suggested, as well as to retain other rights. There seems to be little doubt, and the STM publishers do not even argue the point, that open access deposit is a benefit to scholarly authors. But authors will have to decide for themselves if assigning copyright while retaining that right really serves their best interests or whether they should negotiate to keep their copyrights and give the publisher a more limited permission to publish.

# P2P and New Business Models

*Wed, 14 Nov 2007 07:15:13, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management, category: technologies]*

Peer-to-peer file sharing is usually not a scholarly communications issue in itself. Most such activity involves the infringing reproduction and distribution of music and video files, and it is more of a problem for colleges and universities than a benefit. Nevertheless, there are legitimate forms of file-sharing that happen at universities (and between them), and the big danger that recreational file swapping poses to schools is that draconian measures to control the illegal activity will also inhibit legal and productive collaboration.

Each time Congress proposes to address file-sharing at universities, this is one of the concerns that unites the higher education community against the proposals. Another concern is that the cost of implementing new mandates will be very high, even though university networks account for only a small portion of the overall problem. The recent proposal in Congress (see [article here from the Chronicle of Higher Education](#)) is a case in point. The proposal to require that universities develop a plan to address file-sharing is a little bit insulting — most schools already have a plan — and the instructions to offer alternatives to illegal music downloading and to explore technological solutions to the problem are unfunded mandates that could cost hundreds of millions of dollars. And filters that stop music sharing may also inhibit legitimate collaboration; the history of Internet filters suggests that they are often more effective at preventing legal activity than illegal.

The problem posed by illicit file-sharing will not be solved by increased enforcement measures; the genie is already out of the bottle in that regard — P2P swapping has grown beyond the bounds of any attempt to stop it using either law or technology. What are needed to curb the growth of P2P are business models that make legal acquisition of digital music and movies more attractive than the illegal alternatives. Georgia Harper from the University of Texas (see her blog [here](#)) has been a vocal advocate of business model development as a solution to some of our current copyright problems, and a conversation between Georgia and some speakers at a recent conference caused me to start wondering what such business models would look like.

One possibility came to my attention (rather belatedly, I suppose) while watching a football game on Saturday. Verizon Wireless was heavily advertising its V-Cast Song ID service, which allows a user who hears music that they like to capture a sample of the audio, identify the song and purchase a copy directly from, and to, their cell phone (see [news report here](#)). This, it seems to me, is exactly the kind of value-added service that can move listeners back to legal music downloading services, and it represents a much more positive solution to the problem of file-sharing than any of the legal remedies yet proposed.



# Desperate ploy, or copyright coup?

*Mon, 19 Nov 2007 07:44:50, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

In the digital age, it is hard to imagine that personal photocopying still poses much of a worry for copyright owners. Isn't the real problem, after all, the ability to make perfect copies and to share them instantly with thousands of others? Traditional photocopying poses neither of these dangers, and personal copying is a long settled fair use, isn't it?

Not, apparently, for [Access Copyright](#), the Canadian copyright licensing agency that, like its US counterpart the Copyright Clearance Center, collects and distributes permission fees for various uses of copyrighted material. Access Copyright has recently filed a lawsuit seeking 10 million dollars — the largest damages award ever sought for copyright infringement in Canada — from the office supply chain Staples. Their claim is that Staples should be liable for infringing copying done by customers on equipment provided by the stores. There is a news report on the suit from the Canadian Press [here](#), a negative assessment from P2Pnet [here](#), and a [comment from a Canadian professor of IP and technology law here](#).

To prove secondary liability on the part of Staples, Access Copyright will have to convince a court that Staples should be held responsible for copying done by its customers. As Professor Geist points out, that may be a difficult hurdle to clear. In Canada, as in the US, liability for those who merely supply the equipment to make copies is rare; the US provides statutory protection for libraries in such cases and the Canadian Supreme Court has established a similar “presumption” in favor of Canadian libraries. Explaining why that presumption should not apply to Staples will be a challenge for this lawsuit.

But the issue that should really worry us, the issue that makes this a radical attempt to change the terms of the copyright bargain rather than merely a desperate ploy to protect a new source of revenue as traditional sources dry up, is that Access Copyright will have to show that the personal copying done by customers is direct infringement of copyright. Only if that is true can Staples be held secondarily liable for providing the means for that infringement. But personal copying has been almost universally believed to be fair use (or, in Canada, “fair dealing”). Students have made single copies of journal articles and book chapters for their own study for as long as photocopies have existed, and consumers have made personal copies of TV shows with their own VCRs with the blessing of the US Supreme Court. So what has changed?

The clue is in the fact that this suit was brought by a licensing agency, not by publishers or authors. What we are seeing here is a new assertion that personal copying was never legal, only tolerated by copyright owners until they could create a mechanism to collect payments. The same digital technologies that have allowed so much infringement also now allow content owners to efficiently offer licenses and collect payments for individual uses that could never have supported a market before. Although it is still more efficient to sue the alleged contributory infringer instead of the consumer who is the direct infringer, this saber rattling by a licensing agency should tell us quite clearly that content owners intend to move toward a pay-per-use model. If such suits are successful, every consumer-made copy logged at a store or even at a library photocopier could be subject to small payments, which would be administered through an online licensing agency.

At a recent conference in Washington, DC, Cary Sherman, the President of the Recording Industry Association of American, refused to acknowledge that personal copying of a music CD for listening on an

individual MP3 player was fair use. Instead he said that this likely was infringement, but that the industry had agreed internally not to pursue such cases. The Canadian lawsuit suggests that, if a precedent can be set regarding the much less contested area of personal photocopying, any such forbearance around consumer copying will quickly become a thing of the past.

# Should I register my copyright? (weekly widget)

*Wed, 21 Nov 2007 14:53:22, ksmith12@duke.edu, [category: notes]*

It is no longer necessary to register in order to have copyright protection, just as it is not required anymore to have the symbol (c) attached to a work in order to protect it. Copyright protection is automatic, starting as soon as a work is fixed in tangible form. But registration is still important in some situations. You must register a work before you can sue someone else for infringement, and registration creates a presumption that you own a valid copyright. Also, registration within certain time limits makes it possible to receive a larger damage award and attorney's fees if a copyright owner can prove infringement. So registration is a good idea to protect the economic value of a work, but it is not required; each creator can make a decision about whether or not registration will best serve that individual's interests.

Registration is accomplished by filing a form, found on the [Copyright Office's web site](#), along with a copy of the work being registered and a fee, which is currently \$45.

# By any other name?

*Mon, 26 Nov 2007 11:51:39, ksmithl2@duke.edu, [category: scholarly-publishing]*

Last week Paul Courant, Dean of Libraries (and formerly Provost) at the University of Michigan, posted a thoughtful blog entry on [“Why I hate the phrase scholarly communications.”](#) He is kind enough to say some nice things about this blog in his post, for which we are grateful, but I don’t want to let the glow of flattery distract me from addressing the excellent point he is making. “Scholarly communications” is a confusing term that conveys very little information to anyone outside of a circle of initiates within academia.

Even amongst the handful of academic libraries that have appointed positions with scholarly communications in the title there is wide variation in how that role is understood. For some a scholarly communications officer is primarily a copyright consultant, for others an advocate for digital publishing, for some an advocate for legislative change and for yet others a collections librarian trying to deal with alternative publications and journal subscriptions. As Courant points out, what all the various tasks have in common is attention to the business of scholarly publishing — the economic, legal and physical mechanisms by which scholarship is disseminated. Functionally, one might call a scholarly communications program that point (or points) at which an academic library is engaged with scholarly publishing in a role other than as a consumer. Attention to this bundle of concerns, however, extends well beyond the library at many institutions, and it must do so if real change is to occur.

At Duke we became aware of the naming problem when the [new Libraries’ home page](#) included a link for “Scholarly Communications” that was very seldom followed. We decided to rename that link “Copyright and Publishing” — the topics actually discussed in this space — in hopes of attracting more readers. Certainly for faculty the latter name identifies concerns they often are very conscious of, while the former likely does not. I sometimes wonder if “Copyright and Publication Librarian” might not be a more accurate and descriptive title for my position. Yet in the final analysis I am not ready to scrap the phrase “scholarly communications” just yet.

Terms of art are always difficult to handle. To take an example from my other profession, which is laden with them, a lawyer writing a brief who wants to argue that some element of her case is so obvious that no evidence for it need be adduced will use the phrase “res ipsa loquitur”; if she does not, a court will think her poorly trained. But if she uses it when talking to a client, she is guilty of poor professional judgment; attorneys must avoid obfuscation when explaining law and strategy to lay people. Terms of art are shorthand means of communication within a community of practitioners but they require explanation and clarification outside that “inner circle.” If we were to adopt Courant’s suggestion that we simply speak of “publishing” instead of scholarly communications, we would encounter a different confusion, but the same need to explain to the uninitiated exactly what we mean. Scholarly communications is now a recognized term within much of the academy, but like many such terms it is foreign to those outside the ivy-covered walls. I plan to continue to treat my oddly uncommunicative title as a teaching opportunity and decide in each instance whether I am better served by using it (and often having to explain what it means) or by substituting a longer but more descriptive phrase in those situations where the term of art will fail entirely to gain attention from the audience I am seeking.

# If I cite the source I am using, can it still be copyright infringement? (weekly widget)

Fri, 30 Nov 2007 07:24:52, ksmithl2@duke.edu, [category: notes]

Citation is a cure for plagiarism, which is a different, but related, problem from copyright infringement. Plagiarism is the *unacknowledged* use of the work of another — falsely claiming or creating the impression that you are the creator of someone else's work. It is possible to plagiarize a work even if it is not protected by copyright; one can plagiarize from Adam Smith, who died in 1790, as easily as from Milton Friedman, who died last year. And citing the source always cures plagiarism.

Citation, however, does not cure copyright infringement, which is the *unauthorized* use of another's work. If you copy an entire journal article by someone else, without permission, into a book you publish, you probably have infringed copyright, even if you add a footnote citing the original author and source. Citation may help show a good faith fair use argument, but it neither prevents plagiarism nor guarantees fair use. Copyright infringement is avoided either by having the copyright owner's permission when using someone else's material or by relying on one of the many exceptions to copyright.

Copyright, of course, does not protect everything. You cannot infringe a copyright when you use public domain material, especially when you take only ideas from another source but do not copy protected expression, since copyright does not protect ideas. But if you fail to acknowledge the source of those ideas, you may still be guilty of plagiarism.

# Who owns a paper written by three professors? (weekly widget)

*Thu, 06 Dec 2007 12:34:59, ksmith12@duke.edu, [category: notes]*

When there are joint authors of a work, each is a co-owner of the copyright in that work. This means that each author has the right to authorize publication of the work, use of it by a third party or the making of derivative works. It is very important, therefore, that joint authors agree in advance on how and when they wish to publish a work; conflicts develop when a single joint author authorizes a use of which the others do not approve, although such authorization is legal. Each joint author is responsible to account to the others for any profits received for the work.

Authors become joint authors when two or more each contribute protectable expression to a work with the intention that their contributions be combined into a unitary whole. Since intention is required, it is not possible to become a joint author accidentally. Contribution to a volume of essays or other collected work does not create joint authorship. Joint authorship is independent of academic rank or any other subordinate relationship (except that of employer/employee) ; a tenured professor, an adjunct instructor and a graduate student would all have equal rights in any work of which they were all joint authors.

# What makes a journal valuable?

Wed, 28 Nov 2007 14:05:32, ksmith12@duke.edu, [category: scholarly-publishing]

For almost 90 years, librarians, faculty authors, tenure review committees and publishers themselves have relied on a single measure — the impact factor — to determine the relative quality of different scholarly journals. Impact factors are based on the number of times articles from a particular journal are cited in other scholarly articles. The citations to articles in one journal are cumulated to calculate the impact factor. It is fairly obvious that this system has some problems, however. For one thing, frequency of citation is a poor marker for quality, since all cited references to a work may not be positive and approving. To posit an extreme example, many articles that cite one specific article as a particularly bad example will boost the citation rate for that article and could raise the impact factor of the journal that published the flawed study. Also, journals are not all of equal quality or influence (which is the point, after all), so many citation from peripheral journals may not be as important as one or two citations in the really influential and universally-read publications. Impact factor can flatten these distinctions in regard to a single article, although cumulation over time should cause the “best” journals to rise to the top.

A new measure of journal quality, called the [Eigenfactor](#), tries to address this last problem by starting with an evaluation of journal quality and assessing article impact on that basis. As their [explanation of their methods](#) says,

“Eigenfactor provides a measure of the total influence that a journal provides, rather than a measure of influence per article... To make our results comparable to impact factor, we need to divide the journal influence by the number of articles published.”

Leaving aside the complex mathematics explained at their site, the Eigenfactor is based on an algorithm that maps how a hypothetical researcher would move from article to article based on cited references. This mapping yields a measure of the amount of time that researcher would spend with each particular journal. The score of a journal is based on that finding, and the influence of articles is measured by the influence of the journal in which they are published. This method corrects for peripheral citations and, it is claimed, for different citation patterns in different disciplines.

Both of these methods, however, measure the quality of journals only from within the relatively closed world of traditional periodical publication. Can we imagine ways of assess journal quality that can account for external factors and hence for the changes that are occurring within scholarship?

The advent of online aggregators of journal content has offered one relatively simple external measurement of journal impact which librarians have been quick to embrace — cost per article download. It used to be very cumbersome to try and tally which print journals were most used in a library, based on how often copies were picked up and reshelfed. Now databases offer constantly updated counts of downloads which are easily divided into the cost of the database to provide a measure of where collections budgets are best spent. Since many downloads will reduce the cost per download, this metric also can serve as a rough indication of quality, or, at least, influence.

The real question I have, however, is how to assess the importance of traditional journal publication vis-à-vis newer, informal means of communication that are growing in importance amongst scholars. As blogs, wikis and exchanges of working papers via e-mail grow, scholars are getting their inputs and influences from new sources, and web publication of various kinds often supplements, and occasionally

supplants, tradition publication. As the ACRL's recent paper on "[Establishing a Research Agenda for Scholarly Communications](#)" puts it,

"Extant measures may suffer from being tightly coupled to traditional processes while also inhibiting the application of other measures of value. In the new digital environment, activities other than traditional or formal publication should be valued in the reward structure for scholarship."

I know of no metric that can yet account for the variety of informal publications and their relative influence. That, of course, is why it is part of a research agenda. As these informal, digital means of sharing scholarly work become more common, one of the principle functions of traditional publication — that of communicating the finished products of research — may become less and less important. Other functions, such as registration, certification and preservation, may continue to rely on traditional journals for a longer time. But the academic world needs to look carefully for ways to evaluate and compare the influence of a variety of new communications if it is to value scholarship based on its true impact.



# Exhausting consumer use

*Mon, 03 Dec 2007 17:39:24, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

Two different lawsuits are currently underway that attempt to support the notion that users should be able to do what they want with the particular instantiation of intellectual property that they buy, a principle that is under attack through the use of “licenses” at the point of a product’s sale.

In patent law the principle is called exhaustion, and it says that the patent is “exhausted” upon the first sale of a product; the consumer is free to use, repair or resell the particular product they bought, although they can not manufacture copies or new inventions that incorporate or imitate the product. Dissatisfied with this rule, many manufactures are trying to place various labels on their products to control uses of the product in the hands of consumers. In “Quanta v. LG Electronics,” a manufacturer’s use of a label claiming the product is “not for resale” is being challenged. The Electronic Frontier Foundation is supporting that challenge, and more information can be found [here on their website](#) [“Deeplinks” blog](#).

As the EFF points out, these challenges to unfettered consumer use have had growing success recently. Lexmark has been able to “condition” its sale of printer cartridges with a “single use only” label that could make a consumer who refills the cartridge liable for breach of contract. This, and the “not for resale” label on software CDs at issue in the LG case, turn patent law upside down, and cost consumers money. Numerous “friends of the court” are asking the Supreme Court to revive the doctrine of patent exhaustion.

In copyright, a similar fight is going on to preserve the right of consumers to use the copy of a copyrighted work that they buy as they wish. In this arena the principle is called the First Sale doctrine, but its definition is exactly the same — the distribution and display rights in copyrighted material are exhausted after the first sale of the book, artwork, etc. In “Vernor v. Autodesk, Inc.,” a purchaser is claiming that a software distributor should not be allowed to prevent an eBay sale of the particular copy of the software he bought by using that same “license” provision that forbids resale. The issue is whether a manufacturer can convert a transaction that looks exactly like a sale — the exchange of money for a product that the consumer carries away — into a licensing transaction merely by shrink-wrapping a license agreement into the box. Courts have largely upheld these unilateral licenses, but there has been a split of opinion, as William Patry explains in a [blog post here](#). Public Citizen, representing Mr. Vernor, [argues that the first sale doctrine should preempt](#) this provision of the so-called license.

These parallel cases in copyright and patent law show a concerted attempt to control how consumers can use the specific copies of intellectual property they purchase legally. This is not about defending themselves from unauthorized copying, since the law already does that; it is an attempt to choke off a secondary market that has been allowed for centuries. I called this a copyright [coup in an earlier post](#), and I can only hope the courts will not allow it.

# Worth noting — a public domain search engine

*Sat, 08 Dec 2007 12:44:31, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation]*

[Appropedia.org](http://Appropedia.org), which describes itself as “the site for collaborative solutions in **sustainability, poverty reduction and international development**,” has made available, in cooperation with Google, a [beta version of a “public domain search engine.”](#) The purpose, of course, is to help people find public domain material that they can use freely, without having to worry about copyright restrictions. Since such material can provide source for education, creativity and economic development, this project fits well into the self-defined mission of Appropedia.

It appears that the search engine focuses primarily on U.S. government material, which is in the public domain from the moment it is created. They have a [nice explanation here](#) of how they have gotten to the point of beta launch and where they hope to go. While this is a good start, there is a wealth of public domain material beyond the reach of this plan. Like the Google book search, this project is limited by the difficulty and expense of discovering what is and is not in the public domain. Ironically, while this search engine focuses on federal government materials, the Google Book project treats most government material as copyrighted works, since its definition of the public domain is limited to material published before 1923. Both definitions are radically narrow, and they emphasize the need to revise our copyright law to make the many works that are likely in the public domain (many so-called Orphan Works never had their copyright renewed, for example) easier and safer for the public to use.

In the meantime, however, this search engine, along with the more robust ability to [search for material licensed under the Creative Commons licenses](#), offer great tools for helping scholars, teachers and others escape the straitjacket of our overly restrictive copyright law.

# Property or privilege

*Tue, 11 Dec 2007 07:10:58, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The debate over how best to understand the odd notion of intellectual “property” is long-standing. Many find that an analogy between the products of intellect and creativity on the one hand, and property on the other, deeply inappropriate. There is no doubt that such an analogy is often badly abused. When the recording industry insists that music file-sharing be referred to as “theft,” for example, they ignore a fundamental difference between the physical and the intellectual realms. When physical property, a car, for instance, is stolen, the owner is entirely deprived of the enjoyment of that property. When music files are swapped, on the other hand, the owner may suffer a loss of value in her property, but she is not subject to the same total deprivation.

These issues are explored in a [new book](#) and an [accompanying blog](#) by Chapman Law School professor Tom Bell called “Intellectual Privilege.” Bell’s basic point is to suggest a better way to look at the legal protection of the products of human intellect; one that neither equates them entirely with physical property nor dismisses all such protection as a burden on the ideal of free use:

“I here offer a third view of copyright. I largely agree with my friends on the left that copyright represents not so much a form of property as it does a policy device designed to “promote the Progress of Science and useful Arts” (as the Constitution puts it). I thus call copyright a form of intellectual *privilege*.”

Bell’s project promises to generate some fascinating discussion about the nature and uses of intellectual production, and it models an emerging form of scholarship by making the text available pre-publication for public comment. For even more discussion, see the Lessig Blog, where an [announcement of Bell’s book](#) has also generated interesting comment.

I look forward to following this debate, but at the outset I want to note that the analogy between IP and physical property is not all bad and is sometimes quite useful. The basis of James Boyle’s now classic article on “[The Second Enclosure Movement and the Construction of the Public Domain](#)” is, after all, just such an analogy. And I recently used the analogy with physical property, appropriately, I hope, if less brilliantly, to [refute some of the parade of horrors](#) that some have suggested will follow from a mandate to make the products of NIH funded research available in open access.

Bell emphasizes that IP is a bundle of privileges granted by the government to enact certain policy goals. But this definition is equally applicable to physical property; property ownership is a government granted right to exclusively enjoy (that is, to exclude others from) a particular object or piece of land. As with IP, the exclusive rights of physical property ownership are subject to numerous restrictions and exceptions (taxes, zoning, etc.) that help serve public policy ends. The real object of the discussion should be to arrive at a careful understanding of both physical property and intellectual privilege and then look at how they relate, where they differ and what policy alternatives might result from the differing views. Tom Bell has offered us a wonderful opportunity to participate in that project.

# What are the exceptions to copyright?

## (weekly widget)

*Fri, 14 Dec 2007 07:30:26, ksmithl2@duke.edu, [category: notes]*

There are a large number of exceptions to the exclusive rights given to copyright owners. In fact, over 1/3 of the text of the Copyright Act — sections 107 through 122 — are limitations and exceptions to those exclusive rights. All of these sections explain situations in which it is not necessary to obtain authorization from the copyright owner for a given use, even though that use would otherwise infringe one of the exclusive rights. Many of these exceptions deal with very narrow and technical matters, like the rebroadcast of television programs over cable or the reproduction of certain materials for use by the visually impaired. Most of the sections provide for exceptions to specific rights in the copyright “bundle.” Section 110, for example, lists several exceptions to the right to authorize public performances or displays, but it does not refer in any way to the other rights like reproduction or distribution. Only fair use, found in section 107, is an exception to all of the rights held by a copyright owner; when fair use applies, reproduction, distribution, performance, display and the making of derivative works may all be done without authorization.

For purposes of teaching and research, fair use and the first two provisions of section 110 are by far the most important copyright exceptions, and we shall discuss these three provisions in upcoming widgets.

# Leaky faucets and copyright in Canada

*Tue, 18 Dec 2007 14:14:59, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

Here in North Carolina, a very severe drought finally motivated me to try to stop the drip in our kitchen faucet. I tried and tried to tighten the faucet enough to stop the leak, but simply could not tighten enough. Finally I faced the fact that a more comprehensive solution was required, and we replaced the old faucet with a new, leak-free fixture.

In Canada this month, folks trying to fix their copyright law have illustrated the same principle — it is often not enough to just tighten things up when what is needed is comprehensive repair. For some weeks rumors have flown that the Canadian government, acting through its Industry Minister, intended to introduce a copyright reform bill that would mirror the Digital Millennium Copyright Act here in the US. Both the US government and media interest groups in this country have been pressuring Canada to “normalize” its copyright law along the highly restrictive lines modeled by US Title 17.

As this [article from the Electronic Frontier Foundation](#) indicates, these plans rather backfired. A surprisingly large grassroots reaction to the proposal developed quite quickly, led by [Professor Michael Geist](#) of the University of Ottawa. Over 20,000 people joined a “Fair Copyright” Facebook site — a powerful testimony to the new awareness and concern over copyright regulation that is beginning to filter down to consumers. The result is that the Government decided to delay introduction of their bill, which the opposition had dubbed the “Canadian DMCA.”

We can but hope that this attention and advocacy will not abate in the new year, and that Canada will use this momentum to actually fix its law, striking an appropriate balance between the rights of creative artists and the needs of consumers, as well as educators and new creators. Simply tightening current rules will not work, as both my leaky faucet experience and the “finger in the dike” approach adopted by the RIAA indicate.

In the course of the campaign against the proposed reform law in Canada, Professor Geist and his colleagues created this [YouTube video](#), which offers over two dozen suggestions about what ordinary consumers can do to influence the debates about copyright. These simply actions, like making sure that digital media retailers will accept returns if consumers discover DRM systems that they do not want to accept, could profoundly influence both legal policy and commercial practice. But if I could choose one that I wish would become a New Year’s resolution for many academics, it would be number 23 — “Read license terms.”

# What are the specific teaching exceptions? (weekly widget)

*Thu, 20 Dec 2007 12:27:30, ksmith12@duke.edu, [category: notes]*

Two exceptions, found in section 110(1) & (2) of the Copyright Act, apply specifically to teaching activities. These are both exceptions to one of the exclusive rights held by a copyright owner, the right to authorize public performances of the copyrighted work. Public performances happen all the time in teaching, whenever a poem is read, a play staged or a film screened for students. All of these performances would be considered public, even when confined to a small class of students, under the broad definition in the copyright act. So a specific exception to the public performance right is included as section 110(1), which allows public performances without permission as part of face-to-face teaching activities of a non-profit educational institution, in a classroom “or similar place devoted to instruction.” The only further requirement to benefit from this exception is that the copy of a film or other audio-visual work that is performed must be legally made. Copies that are purchased from a reputable vendor or borrowed from a library, a friend or a video-rental service are all lawfully made.

The other teaching exception in 110 is the TEACH Act, which greatly expanded the opportunity in subsection (2) for performances via distance education. Unlike subsection (1), the TEACH Act is full of specific requirements to enjoy its benefit. Some of these requirements are rather difficult for many institutions to fulfill; the best summary of how to interpret and use the TEACH Act is found in this [TEACH Act toolkit](#) from North Carolina State University.

Because these exceptions are so specific and, in the case of the TEACH Act, so difficult to use, many educational activities have to rely on fair use — the broadest exception in US law to the rights of a copyright holder — if they are to proceed without seeking permission.

# How does Fair Use work? (weekly widget)

*Fri, 28 Dec 2007 13:53:57, ksmithl2@duke.edu, [category: notes]*

Fair Use is the only exception to the copyright law that applies to all of the rights in the copyright “bundle” — reproduction, distribution, public display, public performance and derivative works. If it applies, fair use can allow otherwise unauthorized uses that involve any or all of these rights. The problem is that it is very hard to predict when fair use will apply.

Fair use was an exception to copyright created by judges in order to maintain an equitable balance between copyright holders rights and the legitimate needs of users. It was incorporated into the new copyright law in 1976 with no intention to change the flexible, factor-based analysis that judges had been using all along. So instead of a set of requirements that have to be met for all the other exceptions to apply, fair use has a set of four non-exclusive factors that judges are to balance. It is not a checklist nor a mathematical equation, but rather considerations to be balanced in order to help judges decide what is fair.

The four fair use factors listed in section 107 are 1) the purpose and character of the use, 2) the nature of the copyrighted work, 3) the amount and substantiality of the portion used, and 4) the effect of the use on the potential market for or value of the original. In addition to these factors, section 107 lists some illustrative examples of activities that might be fair use — “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.”

Because it is “an equitable rule of reason” applied by judges, and therefore quite uncertain, some people are afraid to apply fair use. Nevertheless, it is an essential tool for higher education and the only copyright exception that is flexible enough to accommodate new uses and new technologies. It is very important, for this reason, that academics continue to consider the four factors and make good faith decisions about fair use whenever appropriate.

# Bad impact?

*Fri, 21 Dec 2007 12:30:10, ksmithl2@duke.edu, [category: scholarly-publishing]*

As I have [discussed before](#), impact factors are tremendously important in the process of evaluating the quality of scholarship and the career prospects of academics. So it is especially troubling to read this [editorial called "Show Me the Data,"](#) published in the Journal of Cell Biology this week by two scientific journal editors and the director of a university press, raising questions about the reliability of those impact factors on which so much depends.

Impact factors are calculated, and marketed, by Thomson Scientific, which was formerly known as the Institute of Scientific Information, or ISI. For many years ISI has published citation indexes, and the impact factors are an outgrowth of those works. When an academic is being assessed for tenure, promotion, grant funding or even a salary bonus, it is a common practice to consult a citation index to determine the influence of that professor's work and to look at impact factors to see if she is publishing in the most influential places. So Thomson/ISI has tremendous influence in the whole structure of academic hiring and rank. The editorial in JCB takes a look at how firm the foundation for that influence is.

The editorial reports on the authors' attempts to replicate the calculations that result in specific impact factors. The data they were able to purchase from Thomson Scientific contained what they believed were errors in Thomson's own reported methodology and did not lead to results consistent with the published impact factors for the three journals involved in the study. When queried, Thomson replied that a different set of data was used to calculate impact factor than that sold from their "research group." But even when they were reportedly given access to the other data set, the authors were unable to replicate the published findings. Their conclusions raise a significant concern: "It became clear that Thomson Scientific could not or (for some yet unexplained reason) would not sell us the data used to calculate their published impact factor... Just as scientists would not accept the findings in a scientific paper without seeing the primary data, so should they not rely on Thomson Scientific's impact factor, which is based on hidden data."

By itself this paper does not close the book on the accuracy of impact factors. There are many questions one would like to ask, some of which are unanswered because of restrictions on how Thomson Scientific allows purchasers to use the data that they buy. But there are already many other reasons to question the role of citation rates and impact factors in the promotion and tenure process, such as their inability to account for new modes of disseminating the results of research and scholarship. This article simply strengthens the case for a more multifaceted and qualitative approach to academic evaluation.



# Strangling our cultural past

*Wed, 26 Dec 2007 07:38:00, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

In a recent post about [“The Global Garroting of the Public Domain,”](#) William Patry describe beautifully how we have arrived, in the US, at such a long term of copyright protection, and how international trade negotiations are used to continually ratchet up the pressure for ever-stronger and ever-longer copyright rules. The main point of his post, about how US interests now seriously threaten the publishing industry in Korea, not because of piracy in Korea but merely because some large US content owners are anxious to keep older works in this country out of the public domain, is a sad lesson in unintended (at least by some) consequences. His post, as well as some interesting comments on it by Georgia Harper [here at Collectanea](#), reinforces a point made in this space about [“policy laundering”](#) using international trade negotiations.

As if to add strength to Patry’s argument that the real purpose behind copyright term extension has never been stronger incentives for future creation, but rather to keep older works out of the public domain, two recent news articles recount cases on exactly that topic. In one, with an international flavor of its own, Japanese news sources [report that the Supreme Court in that country has rejected a claim](#) by US movie studios that the 1953 movie “Shane” should continue to be protected even though its copyright expired, under the Japanese law in place at the time, at the end of 2003. A new law put an extension of the term into place as on January 1, 2004, but the court declined to apply the extension to movies that fell into the public domain at the same moment that the new term of protection took effect.

Content owners were more successful in their arguments that some [studio outtakes from songs by Elvis could not be used in a new album](#). Although the producer of the new album by Cargo Record firmly believes that the material was recorded early enough to be in the public domain, the company has decided not to release the album after a threatening letter from Sony BMG. A Sony spokesman was very frank about not wanting to let others “assume” that these works are in the public domain when they “may” not be. A perfect expression of the “chilling effects” that may be the primary purpose of the Sonny Bono Copyright Term Extension Act.

These cases provided added evidence to Patry’s powerful argument that restricting the public domain, not encouraging creativity in the future, is the real motive force behind not only our last copyright term extension but also the calls that are already being heard for further extensions.

# NIH public access mandate becomes law

*Thu, 27 Dec 2007 09:58:03, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

On the day after Christmas, President Bush signed the Omnibus Appropriations bill for fiscal year 2008, ending a long struggle with Congress over earmarks, appropriate funding levels for various government agencies and continued funding for the war in Iraq. Buried deep in this huge and complex document (section 218, to be specific, although not all the sections seem to be numbered) is language that turns the voluntary program of open access deposit for research articles that are the result of National Institute of Health funding into a mandate.

Beginning immediately, apparently, when an NIH funded researcher has a article about her research accepted for peer-reviewed publication, she is required to deposit a copy of the final version of the article into the open access PubMed Central database within 12 months of publication.

Librarians, and many others in higher education, have lobbied for several years to get this requirement, and others like it for research funded by other taxpayer supported agencies, enacted. Now the issues of implementation become both real and urgent. How can we help faculty researchers understand the new mandate? What publishers can we recommend, and can we help faculty review their publication contracts to be sure compliance (or even earlier public access to the article) is allowed? Some publishers, like Elsevier, already promise to deposit copies of articles they publish for researchers. Publishing with such a publisher is an easy way to comply with the mandate, but it will almost certainly result in the full 1 year delay before open access. For many researchers, there will still be significant advantage in accomplishing open access much sooner than this. So the task of assisting faculty with understanding their alternatives, negotiating their publication contracts and navigating the mechanics of open access deposit are even more urgent services that academic libraries can and should provide.

# Changing the economics of scholarly publishing

Wed, 02 Jan 2008 14:09:20, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]

[Inside Higher Ed](#) recently published an [article about a “New Collaboration for Scholarly Publishing”](#) that describes how five university presses hope to alter the discouraging economic situation for publishing scholarly books. NYU, Fordham, Temple, Rutgers and UVA presses are collaborating to create a joint system for copy editing, design, layout and typesetting a series of books about American literatures. The project, funded by a grant from the Mellon Foundation, aims to produce over 100 new books that otherwise might not have been published due to cost constraints. By reducing the expenses that are common to all publishing operations, the project expects to allow each press to issue 5 additional books each year over the 5 years of the project.

Two aspects of this project make it significant beyond its own goals. First, it is only the initial such project that Mellon plans to finance; similar projects in Slavic studies and ethnomusicology are already in the works. Second, and most important, this project will help demonstrate that cooperation between academic presses is possible without surrendering the unique features of which many university presses are justly proud. Each of the publishers in this first project will be responsible for selecting its own titles and will continue to select in the specific area within the broad topic that is their own specialty.

It is no secret that publishers routinely have to reject quality manuscripts because the costs of production make them poor financial risks, however good the scholarship may be, and that many young scholars therefore can not get their work published. The hope for this experiment is that the value of collaboration, in terms of significant cost savings so that more worthy monographs will see print, can be realized without losing distinctive reputations or sacrificing quality.

A far more radical push to change the economics of scholarly publishing is expressed in this [post on “Digital Media, Games and Open Access”](#) from the blog “[Grand Text Auto](#).” It is written by Nick Montfort, an assistant professor of digital media at MIT, ostensibly to explain his reasons for refusing to review for traditional journals anymore, saving his efforts for open access publications. As Montfort says, “there must be a few things that those of us who are part of the scholarly publishing process can do to foster an open-access future. The easiest thing that I’m able to think of is simply not volunteering our labor to lock academic writing away from the public.” His explanation of the current inequitable system of journal publishing is both clear and scathing, leading to his conclusion that that system, based on restricting access to scholarship rather than encouraging it, should be called “anti-publishing.”

These two very different approaches to the economic problems of scholarly communication may seem poles apart, but each is founded on the recognition that our current systems do not serve scholarship very well and are likely unsustainable. Whether changes come through carefully planned collaboration or through the radical disruption of open access (or both), change is certainly in our future.

# Without certainty, how does fair use help? (weekly widget)

*Fri, 04 Jan 2008 09:48:23, ksmith12@duke.edu, [category: notes]*

Congress recognized that fair use is hard to apply, since one is only certain that a use was fair after a judge decides that it was. So Congress added a provision to encourage teachers and librarians to use fair use where it reasonably can apply. Section 504(c)(2) of the copyright law, part of the section about remedies for infringement, says that “statutory damages,” which are the largest liability in most infringement cases, must be remitted to \$0 if the person found to be infringing is BOTH an employee of a non-profit educational institution acting within the scope of his or her employment AND had a good faith belief that the use they made of the copyrighted material was fair use.

This provision greatly reduces the risk when academics think about fair use, since it eliminates most of the money that can be awarded if it is found that the user was mistaken in their fair use analysis. But it is important to note that the belief that a use is fair must be in good faith, which means it has to be both *subjectively honest* (I really did believe it was fair use) and *objectively reasonable* (a reasonable person could have come to the same conclusion). In those circumstances, Congress has created an incentive (by reducing what one has to lose) to make reasonable fair uses of protected material. If after carefully considering the fair use factors ([this checklist](#) can help), one reasonably believes the use is fair, it is often possible that the educational value of going forward will outweigh this reduced risk of getting it wrong.

# How is copyright transferred? (weekly widget)

*Thu, 10 Jan 2008 09:51:57, ksmithl2@duke.edu, [category: notes]*

Copyright, like most other “property” rights, can be sold, inherited through a will, given away or otherwise passed to other people (or corporate bodies). Since copyright is really a bundle of rights — reproduction, distribution, public performance, etc. — it can also be divided up and the different pieces transferred to different people under all kinds of different terms. Thus I can sell my right to reproduce and distribute a song I write to a music publishers, give my right to authorize public performances of that song to my sister (a singer), and will my right to allow translations of the song into other languages to my children.

When I transfer an entire right or my whole copyright (i.e., I keep nothing for myself), that is called an assignment or transfer of the right. Most transfers of copyright must be in writing. In the past, most publication agreements required that an author assign his or her copyright to the publisher; authors rarely retained any of their rights. Today many publication contracts still require a copyright transfer, but they allow authors to retain certain rights like the right to post an article on a personal web page or use it for a conference presentation. Essentially, the publisher who receives the assignment grants these rights back to the author. But increasingly we are seeing another method for sharing the rights in intellectual property being used — the license. As we shall see, a license can be used to make it either much easier or much harder to use a work of intellectual property.

# Still waiting

*Mon, 07 Jan 2008 12:55:46, ksmith12@duke.edu, [category: digital-rights-management, category: technologies]*

It seems we have been waiting for years for the e-book to “arrive.” The promise of having a whole library in a hand-held device has been made for a long time, but the technology has seldom lived up to expectation. The early readers were awkward to use and difficult to read. The latest generation of e-book readers seems to have improved a great deal, but problems still remain.

I participated in a trial of the Sony reader last year, and was very pleased with the visual display and the ease of use. But I was disappointed by the range of books available, which is probably the fault of my quirky and eclectic reading habits, and with the awkward way the reader displayed PDF files. Now the Amazon Kindle is getting a lot of attention. Several people have noted the limited selection (and Kindle does not allow reading of PDF files at all), but the debate about e-books has now begun to recognize another issue that reduces the value of e-books, digital rights management. UPDATE — Comment by Kim Knoch (click on comments above) explains that there is a way to read PDF files on Kindle for a small fee.

DRM is used, of course, to protect the value of a proprietary e-book by preventing copying and display in other devices. But the e-book vendors seem to have missed the obvious fact the DRM reduces the value of the e-book for consumers. By definition, DRM limits the options for readers, and in our world of constant innovation and a plethora of devices that compete for our dollars, options are value.

A blog from the Free Software Foundation dedicated to a campaign against DRM — [Defective by Design](#) — makes this point in a post called “[Don’t let DRM get between you and a good book](#).” The defective by design campaign is primarily a consumer movement, focused on electronic freedom and privacy (the threat DRM may sometimes pose to privacy is another important issue). They make the point that, with DRM limited e-books, every time an updated device is released it could require that consumers buy a new version of their favorite books. They also argue that DRM is bad for authors and publishers as well, supporting a form of “digital censorship.”

The same concern about DRM in e-books is also raised on a recent post on the [if:book blog](#) from the folks at the Institute for the Future of the Book. “[The future of the sustainable book](#)” is part of a much larger discussion, all of which is worth attention. Regarding all sorts of electronic texts, this telling remark clearly places DRM protected proprietary e-books low on the scale of sustainability: “since I work in book publishing, job one is to figure out what it means to create a sustainable book. Lots of models come to mind. Good ones like Wikipedia (device-neutral and always in the latest, free, edition) and bad ones like the Kindle, (which tries to create a market for an ebook reader with designed obsolescence).”

Today a e-mail appeared in my inbox that [proclaimed that the era of DRM is over](#). The author was referring to a recent announcement by Sony BMG that they were finally considering following the lead of much of the rest of the music industry and selling music in an open MP3 format. This is good news, but it is not the end of DRM by any means. Many other issues regarding electronic protection measures remain, and we are still waiting for a truly usable, portable e-book and reader.

# Caveat emptor!

*Tue, 15 Jan 2008 11:51:03, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

This posting on the NY Times Technology blog — [“On eBay, Some Profit by Selling What’s Free”](#) — caught my eye over the holidays because it recounts a situation very similar to one in which we have found ourselves at my university. The post describes the experience of purchasing an old film from an eBay vendor only to discover later on that the entire film is available for free download from the [Internet Archive](#) site. The author is unsure whether to feel cheated, since he paid for something he could have obtained for free, or to recognize that the vendor had earned his fee by finding material the author wanted but would not have found himself. Both the vendor involved and Brewster Kahle, founder of the Internet Archive, basically take the latter position, with Kahle pointing out that no one is getting rich doing this while expressing the wish that more creative, transformative uses were being made of the older material.

At Duke we have been struggling to deal with a very similar situation. A great deal of effort went in to the creation of digital collections feature lots of wonderful material in our collections on the history of advertising. So our staff was understandably distressed to find out that an Internet entrepreneur had downloaded virtually the entire collection, which is mostly public domain images, and was selling the CDs through his own website and via eBay intermediaries. It is a well-established principle of copyright law, of course, that “sweat of the brow” does not give one rights in a collection of facts or public domain material. Nevertheless, we were unhappy because we made the collections available in order to facilitate scholarship and research without barriers of place or fees for access; selling the material undermines our vision of the research purposes of the collection.

We finally decided to send a letter asking the vendor to stop selling this collection. We based our request on three claims — a compilation copyright in the whole collection, which was copied in its entirety with our selection and arrangement (and some commentary) intact; a fear that, because the Duke name appears in a few places, there might be confusion about our relationship with the vendor (there is no such relationship, in fact); and our concern that some of the images may still be protected by copyrights held by the donor who gave us the material in the first place. Most galling to us is the fact that the vendor who has appropriate this material himself claims, on the site, to hold a compilation copyright in the material.

So far our letter has been ignored, and the material is still available for sale. We are unsure if we want to take further steps or what those steps might be. We have no desire to impede the flow of information to people who want or need it. But we do want to uphold the value of free access to the public domain, and also to protect and value the intellectual efforts of our fine curators. Perhaps the best thing I can do is to use this space to encourage readers to check out the **free** digital displays of this fascinating material on the [Emergence of Advertising in America](#) website. And remind all that when someone offers to sell this kind of material that looks like it came from a library special collection, let the buyer beware!

# But it is just so easy!

*Fri, 11 Jan 2008 10:50:08, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

The ease with which we can copy and use stuff found on the Internet, particularly photographs and other images, leads to some delicious ironies when some of the major corporate interests that rail against file-sharing are caught infringing other peoples' copyrights. The [Washington Post published an interesting story](#) on Wednesday that looked at some of these cases where snapshots on the Web were misappropriated for commercial use. Often the unauthorized use is dismissed as accidental — it is amazing how many unsupervised interns appear to doing significant work for these companies — but whether they are the result of inattention or conscious laziness, these lapses suggest that some of the major commercial content owners have little concern for copyrights not their own property. Makes all the rhetoric about theft and the moral claims of creators that is thrown around by these big media companies seem rather disingenuous.

The best thing about this article, however, is the discussion of it, with the wonderful title “[Good Artists Copy, Great Artists Steal](#)” on the Info/Law blog. I don't think I have the chance to point to [Info/Law](#) before, but it is an excellent place for information and analysis about the “convergence of intellectual property doctrine, communications regulation, First Amendment norms, and new technology.” This post, which also reports on a recent infringement action filed against Jerry Seinfeld and his wife, is an nice example of a careful yet entertaining dissection of the legal principles at stake in each of the two reported stories.

The point, of course, is that the Internet has fostered a culture of easy borrowing and creative remixing that is at odds with much of our current law. There is a great deal in that culture that is valuable, with its emphasis on user creativity and sharing, and its conflict with much of the prevailing rhetoric about intellectual property is becoming too obvious, and too ubiquitous, to ignore.



# Wolves in sheep's clothing

Wed, 12 Dec 2007 13:17:20, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation]

A couple of recent developments in the copyright arena remind us that all news is “spun” one way or another (including this blog, I suppose).

A [story yesterday in the Chronicle of Higher Education](#) reports that the Copyright Alliance is proposing a wiki site that will help broker permissions requests from academics; the idea is to have representatives of the content industry monitor the site for questions from professors in order to expedite the permissions process. Sounds good, since the process of asking permission is terribly cumbersome and the result is often nothing but silence from the rights holder. But wait; let's look at the example used in the story. A professor wants to show the film “Monty Python and the Holy Grail” to a class on British Humor. Why, we should ask, is that professor seeking permission at all? An in-class screening of a film within the curriculum of a non-profit educational institution is clearly permitted under section 110(1) of the Copyright Act; no permission is needed as long as a legally obtained (bought, rented or borrowed) copy is used.

The fact that this example is used raises some troubling concerns. This wiki would not be the first attempt by the content industries to try to inculcate a more narrow view of the copyright exceptions than is actually the law under the guise of helping with permissions. Even worse, this site could add more ammunition to the claim that as it gets easier to ask for, and pay for, permission for a particular use, the scope of the fair use gets narrower. It is imperative that academic institutions and faculty members make their own fair use decisions and ask permission when truly necessary, not merely when there is a convenient hand out to take the money.

Last week also saw the [introduction in Congress of a bill called the PRO IP](#) (for “prioritizing resources and organization for Intellectual Property”) Act. In spite of the name, there are many who are pro IP who will not be happy with this bill. Its primary purpose is to ratchet up, once again, the penalties for copyright infringement, both criminal and civil. In the realm of civil damages, this bill would allow music companies to get separate damages for the infringement of each track on an album that has been downloaded without authorization; for a twelve track album the potential damages would rise from a maximum of \$30,000 to \$360,000. This would be a windfall for some in the content industries, but it is hard to see how it would advance the fundamental purpose of copyright law. I am not at all in favor of illegal file-sharing, but the chilling effect this draconian increase in potential liability could have on legal activities seems to outweigh the benefit it could provide. It is already the case that many people are unwilling to exercise their legal rights because of the scare-tactics used by content owners to prop up their failing business models.

The other major purpose of the PRO IP Act is to create two new bureaucracies in the federal government — a “White House Intellectual Property Enforcement Representative” and a new division in the Justice Department dedicated to IP enforcement. The former office seems to be modeled on the US Trade Representative as an adviser to the President and watchdog over US interests abroad. It is not clear whether there has been some felt need for these additional offices outside of the desire by the big entertainment industries to have as many bureaucrats arguing on their side in the copyright conflicts as possible.

There are comments on PRO IP, as well as some links, [here at the Electronic Frontier Foundation site](#).

# How do licenses work? (weekly widget)

*Thu, 17 Jan 2008 12:50:30, ksmithl2@duke.edu, [category: notes]*

Often a copyright owner (or the owner of any other kind of right) does not want to give her rights away, but does want to allow some people to use the subject of the rights in some way. This permission to use the subject of an exclusive right without liability is called a license. If I own land, for example, I can allow my neighbor to cross that land every morning to get to his bus stop. This is a simple license; I promise not to prosecute my neighbor for trespass, but I retain all the other rights in the land, include the right to exclude others and even to prosecute my neighbor if he trespasses outside the scope of the license. Since licenses are private contracts, they can be very flexible, allowing all sorts of terms and conditions to be built in.

Lots of intellectual property is now licensed for specific uses rather than sold, and no copyright is transferred or assigned. In these cases, the money paid is not a purchase price but is “consideration” for the license contract, the use is governed by the terms of that contract, and the parties are bound by the scope of the agreement. Licenses can restrict uses that would be permitted under copyright law if the copyrighted material had been sold. For example, a license can explicitly forbid uses that would be considered fair use if the user had bought the work; things like short quotes from the subject material may be forbidden by contract. Also, purchasing a copyrighted work usually gives the buyer the right (called a “first sale” right) to further distribute that copy — resell it, lend it or give it away — while licenses often forbid this subsequent distribution.

But licenses also can help an author share her work in appropriate ways. Some publishers, in fact, will now accept an “exclusive right of first publication” — a licensed right that does not involve transfer of the copyright — as sufficient to publish a journal article (note that exclusive licenses, like copyright transfers, must be in writing). And many academic authors, as well as millions of other creators, are starting to use Creative Commons licenses to permit many uses of their work while still retaining the right to explicitly authorize or forbid those other uses that fall outside the terms of the license. As we shall discuss next, the Creative Commons is often a better way to protect the values important in the academy than reliance on traditional copyright law is.

# What is the Creative Commons? (weekly widget)

*Thu, 24 Jan 2008 10:38:31, ksmithl2@duke.edu, [category: notes]*

[Creative Commons](#) is an organization that was founded to help authors and creators who are interested in sharing their work avoid the very restrictive rules of copyright, and their subsequent chilling effect on users. The licenses available through Creative Commons allow authors and creators to attach a recognizable legal document to their work, especially but not exclusively web work, that allows users to make broad categories of use of that work without further permission. The most common provisions of a Creative Commons license allow reproduction and distribute of a work as long as the original author of the work is identified and the use is non-commercial. This is called an “attribution, non commercial” license. Creators also have an option to either allow derivative works made from the original as long as the derivatives are also shared under the same terms or to prevent derivative works.

Creative Commons offers a fairly [wide range of license options](#). All of their licenses operate to waive copyright protection in the identified situations, such as for a non-commercial use where the author is identified, while retaining the right to enforce copyright in other circumstances. Thus Creative Commons is very effective for sharing academic work so that other scholars can distribute that work to students or other researchers. If derivative works are included in the license grant, a Creative Commons license also supports the continued development of an idea through collaborative scholarship.

If Creative Commons just supported collaboration and open sharing for education and research, its value would be tremendous. But the ability to require attribution is what really makes Creative Commons licenses so important for academics. Needless to say, since academics seldom are paid for their scholarly work, the credit they receive, and the concrete benefits of promotion, tenure and grant funding that spring from enhanced reputation, make attribution tremendously important. Ironically, our copyright law, as restrictive as it is, does virtually nothing to protect attribution. whereas most countries protect attribution as a “moral right” and also make proper credit an element of a “fair dealing” defense, US law does neither of these things. The ability to require attribution as a condition for sharing and permitting reuse thus makes a Creative Commons license a much more effective instrument for enhancing the values that really matter in the academy than traditional US copyright law.

# In search of a problem?

*Thu, 31 Jan 2008 15:40:24, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

I have [written before about the PRO IP bill](#) introduced in Congress in December of 2007; its primary purpose seems to be to dramatically increase the amount of statutory damages available to a copyright owner whose work is infringed. The specific way this is accomplished — by allowing a separate recovery of statutory damages for each individual work contained in an infringed collection — seems carefully crafted to benefit the Recording Industry Association of America and almost nobody else. So unusual is this provision that the Copyright Office convened a roundtable to discuss it. According to this [report on the event from Public Knowledge's Sherwin Siy](#), the most interesting part of that roundtable was the fact that very few participants seemed very strongly in favor of the provision. This seems to be the classic solution in search of a problem, at least to everyone but the RIAA, who simply want larger recoveries from all their litigation. Siy's long post does an excellent job of explaining the provision, its context and the discussion at the roundtable. This [post by Google's William Patry](#), another participant in the roundtable, offers his perspective as well.

What I want to focus on is the unintended consequences of this steep increase in statutory damages on the problem of orphan works. For libraries and higher education institutions, the difficulty with using a so-called orphan work (a work whose rights holder either cannot be determined or cannot be found) is that high risk is associated with great uncertainty. One cannot predict if a rights holder might turn up sometime after your digital display or YouTube video becomes available, but you do know that, if that happens, the potential liability is very great. Thus works that are serving no useful purpose at all remain hidden because statutory damages are so high that they discourage schools from taking even a small risk. Raising those damages as dramatically as PRO IP proposes would magnify this chilling effect, and the result would be a pure social loss — works that are not generating any profit at all for the rights holders will still be locked away from potential users, readers and viewers because of fear.

The Orphan Works legislation introduced in the last Congress was intended to address this fear, so it seems like a good time to consider re-introducing that proposal. The orphan works bill would have made statutory damages unavailable if a user had made a reasonably diligent effort to locate the rights holder and was not able to do so. If a rights holder reappeared after an unauthorized use had been made, they would be entitled to the reasonable licensing fee they could have collected if they had been around to ask in the first place, but not the draconian statutory damages designed to discourage piracy, not scholarship. With a proposal to increase those statutory damages now on the table, it seems like a great time to really press for the reintroduction of orphan works legislation as well. Only if orphan works protection is considered in conjunction with PRO IP can this legislation, which hardly seems to be needed at all, be prevented from doing far more harm than whatever good it is supposed to achieve.

Orphan works is important legislation in its own right; far too much of our cultural past is unavailable because libraries and universities do not dare risk the expensive vagaries of copyright law. A bill to make socially productive uses of this material possible without inhibiting profits at all is worth reintroducing on its merits. But it is absolutely vital at this point, as a corrective to the excessive protectionism of PRO IP. Let's hope someone in Congress sees the obvious connection between these two pieces of legislation, and orphan works protection makes a comeback.

# Where does a publication contract fit in?

## (Final widget)

*Tue, 05 Feb 2008 14:05:46, ksmith12@duke.edu, [category: notes]*

A publication agreement with a book or journal publisher is a contract between the author and that publisher; it may be either a copyright [transfer](#) or a [license](#). The most important point in this regard is that all authors should read any publication agreement before they sign it to determine which way it addresses copyright.

Most publication agreements are transfers of copyright, but most also allow authors to retain certain rights after they have transferred their copyright to the publisher. Authors should look carefully to understand what rights they are keeping, and remain aware that, if not retained, all rights are given to the publisher in a copyright transfer. One important right that authors usually want to retain is the right to use their own work in their teaching, including making copies to distribute to students or to put into coursepacks or online systems. At least as important is the right to use one's own work in future publications, such as edited collections or proceedings of a conference at which the publication was presented.

The right to use a work in later scholarship brings up another issue — the non-compete clause. Sometimes contracts for book publication will contain a clause saying that the author will not publish something that competes with the book under contract. These clauses can seriously inhibit a scholar's right to continue publishing research in the same field. Since most scholars do not want to abandon a whole field of research after one publication, it is important to read agreements carefully to identify and negotiate over any non-compete clauses and to retain rights to use articles in future publications.

Another right that is becoming very important is the author's right to post her work on a personal web page, in a disciplinary repository or in an institutional repository. Again, many publication agreements are allowing authors to retain this right in some form, but they often restrict what version of the article can be used or when the article can be placed in an open access database. So for this reason also, it is important to read a publication contract carefully.

When a publication agreement is a transfer of copyright, all these rights may be retained, but if they are not specifically mentioned, the author no longer has them. A transfer gives everything to the publisher unless it is explicitly retained. A license, on the other hand, gives only the right of first publication to the publisher, and the author retains all the rights that are not explicitly included in the license grant. Obviously, a license for first publication is the form of publication contract that is most beneficial to the authors, since it gives them maximum flexibility to use their own work after publication has occurred. This kind of contract is not the norm, but some publishers are now willing to accept a license for first publication, so many authors will find that it is at least worth asking.

# Temperence is a virtue

*Mon, 21 Apr 2008 08:32:41, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

I am not much of a drinker, but I guess I can be intemperate in other ways. The Chronicle of Higher Education called my last blog post, about the lawsuit filed against Georgia State University, “[fighting words](#).” I think that is journalistic hyperbole, but I do want to take the opportunity to make a couple of clarifying points and direct readers to some of the healthy debate that is going on.

First, about the free-rider problem. Sandy Thatcher, who is Director of the Penn State University Press, [explains the issue as publishers see it in this reply](#) to the quote from my post in the Chronicle. I want to be clear that I am not necessarily defending the practices at Georgia State; I cannot do so because I only know one side of the argument. One of the advantages a plaintiff gets in a lawsuit is a fairly long period to make their case publicly while the defendant is constrained from replying. But even if “free-riding” applies to the practices at GSU, it is important to note that our law tolerates and even encourages some degree of free-riding on intellectual property as a necessary condition to further creativity. That is the logic behind a long list of exceptions and restraints on the exclusive rights conferred by both copyright and patents, including fair use. My point about free-riding, however, is that it occurs at several places in the system of academic publishing. If GSU free-rides on the publishers, the publishers have likewise taken a unpaid ride on the labor of the University and its faculty when it acquired content from them without payment. Because this free-riding occurs at the very base-point of scholarly publishing, it really cuts off any argument against whatever is happening at GSU based on the incentive system copyright is supposed to create. The incentive for creation that copyright is supposed to offer simply does not exist because publishers absorb all the profits without passing them on to authors.

An exchange in the [comments on my own post](#) discusses this point in some depth. Monica McCormick argues that there is still an incentive system for authors, based on two points. One is the small amount of money that is usually paid to academic authors who publish monographs, and the other is the “stability” of the publishing system which advantages authors through promotion and tenure. Regarding the first point, there are some interesting replies from Prof. Kathleen Wallace, whose article “[Marketing Ideas](#)” addresses the issues of the scholarly communication system from the perspective of neither librarian nor publisher, but faculty author — the very person about whom we are arguing. So I leave that part of the incentive argument to Prof. Wallace and hope [her article](#) will generate some helpful discussion. As for the “stability” of the publishing system, I would note first that this advantage, insofar as it exists, does not seem to be a necessary creation of the copyright system as it is currently put into practice. It is certainly possible to image an equally serviceable system that does not rely on the uncompensated relinquishment of rights. Also, what stability there is in the system — based on effective evaluation and strong reputations — is partially itself the result of uncompensated labor done by faculty members working as reviewers and editors.

Finally, stability in scholarly publishing is currently very much in doubt, largely because of the astronomical prices charged by commercial publishers for academic journals. As more and more of a university’s budget goes for journal content, which often must be purchased repeatedly in different formats, less money is available to serve as incentive in other parts of the system. It is harder and harder to publish a scholarly monograph because sales have dropped so low; a decline that is directly attributable to funds being drawn away from monograph acquisitions by journal prices. McCormick’s point that we should distinguish between large commercial publishers and smaller academic ones, as well as between monograph and journals publishers, is exactly right. The problem is that the actions of

the large commercial publishers — and we have to include Oxford and Cambridge Press, who are plaintiffs in the GSU suit, in this category even though they maintain a nominal affiliation with universities — are destabilizing the remainder of the system. It is simply not the case that all would be well if academics would just stop “pirating” their own works from victimized publishers.

Lastly, I want to comment on how all this should play out in the GSU lawsuit. If that case ever reaches the stage of arguing the fair use defense, I hope the court will look very hard at the second fair use factor — the nature of the copyrighted work. Previously, the action on this factor has been minimal and has largely focused on published versus unpublished works and how much originality is necessary for “thick” or “thin” protection. But the economics of a particular segment of publishing, especially one as dysfunctional as scholarly publishing, ought to be considered when analyzing fair use, and factor two is a good place to do that. If the system is structured in a way that undermines the whole incentive purpose of copyright, as I have argued the scholarly publishing is, factor two, which really focuses on the expectations of creators of different types of works, should strongly favor an expansive application of fair use. After all, it is, uniquely, the creators themselves who are being sued here and who are asking for a space to make fair use of their own works. The court must determine what that space will look like, but it should be reminded that scholarly publishing simply does not function the way other systems of intellectual property creation do.

# Blogging law

*Thu, 07 Feb 2008 13:51:21, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing, category: uncategorized]*

Trying to catch up on interesting developments over the past few weeks, I note the very interesting and wide-ranging discussion going on across several blogs dealing with legal scholarship about the value of blogging in that discipline. It seems to have started with several reports ([here on Balkinization](#), [here on the Volokh Conspiracy](#), and here on [Law Librarian Blog](#)) about the rapid increase in citations to blogs in the legal literature. Lots of interesting questions are raised here. Why are these citations growing? Jack Balkin [writes about](#) the assimilation of blogs into the “larger universe of legal writing.” Is there a different ethic and etiquette for citing blogs in scholarly articles? Eugene Volokh suggests that there is and provokes a [fascinating chain of replies](#). His discussion of the ethics of citing unpublished sources [continues here](#). And finally, is this good for scholarship, or the beginning of the end? Brian Leiter writes a long piece on “[Why Blogs are Bad for Legal Scholarship](#).” In spite of the apparent “liar’s paradox” here — telling others not to read blogs in a blog — Leiter makes an interesting argument about the importance of mediation and some way to test and evaluate the expertise of the one whose writing is being cited.

I have commented before on the growth of informal channels of scholarship, but have not written much about the relevant roles for different types of scholarly venues. These posts, and several others to which they link, do a nice job of starting that discussion. The linking itself is an important phenomenon; blogs provide a novel environment in which arguments and discussions can connect to and interpret each other. From that perspective, citing to a blog in a traditional article seems to defeat some of the principle advantages of blogging — the immediacy and interconnection.

It is also interesting to speculate on why legal scholarship seems to be the discipline in which this conversation is taking place. When I first read about it, I wondered if the unique aspects of legal scholarship, where most of the journals are edited by students rather than by full-time academics, might lead the professorate to feel less proprietary about their publications and thus more willing to experiment outside of the traditional confines of scholarship. Leiter suggests a somewhat different spin on this observation when he writes: “The problem is that reputational effects in the legal academy are mediate by two institutions whose primary arbiters are not, themselves, experts or even quasi-experts... First, one of the major venues for legal scholarship remains the student-edited law reviews” (the second institutional problem is the “journalistic reception” of legal ideas). For Leiter, the problem to which this lack of expertise contributes is the “availability cascade” — “an opinion that appears to be informed gains credibility by virtue of being repeated and thus becoming current in discourse.” For its discussion of this phenomenon alone, [Leiter’s piece](#) is worth reading, even while recognizing that blogs are certainly here to stay and scholarship is going to have to find ways to deal with them.



# Copyright reform suggestions, part 1

*Tue, 12 Feb 2008 07:45:01, ksmithl2@duke.edu, [category: notes, category: copyright-issues-and-legislation, category: technologies]*

I am a little ashamed to admit that, at the American Library Association meeting last month, I learned about a very problematic provision of the U.S. copyright law that I had never heard of before. Representatives of the [Association for Recorded Sound Collections](#) and the Music Library Association spoke to several groups during the meetings in Philadelphia about the effects of section 301(c) on our ability to preserve historical sound recordings. ARSC and MLA are looking for support for their [efforts to have 301\(c\) repealed or amended](#).

When our “new” Copyright Act was adopted in 1976, one of things it did was explicitly preempt state copyright protection. Before the 1976 Act, unpublished works were protected by a wide variety of different state laws (many with perpetual duration), and federal copyright protection usually only took effect when something was published. This created lots of confusing and difficult situations, so Congress took almost all works, published and unpublished, under federal protection, including the limited federal term of protection.

For some odd reason, Congress crafted an [exception for sound recordings](#) that were made prior to February 15, 1972. Those recordings, instead of being subject to the normal copyright rules, continue to be protected by state law until 2067. State protection, which was usually created by judges rather than legislators, often allowed perpetual protection for unpublished works, but were not designed to deal with other materials. Leaving these historical sound recordings subject to the patchwork of state laws has meant that, in fact if not by intent, these historical materials are subject to the most restrictive of state laws and for all practical purposes unusable until 2067. For the earliest recordings, which date from the 1890s, this amounts to a copyright term of over 170 years. Since even preservationists are reluctant to make copies under this bizarre and uncertain regime, many recordings are locked up by copyright for longer than the usable life of the medium in which they are recorded; they will be irretrievably lost before they are available in the public domain.

So here is an opportunity to reform our copyright act to mitigate one of its most pernicious effects — the unnecessary loss of our cultural heritage merely to time and decay — without harming anyone’s economic interests. In fact, compilations of some of these old recordings that are available for sale in other countries but technically infringing in the US could finally be sold here as well. The recording industry frequently lobbies Congress for full performance rights in sound recordings, and there was legislation to add such rights introduced into both houses late last year (the “[Performance Rights Act](#)”). Whether or not it is a good idea to subject radio stations to all the licensing fees such a law would require, this seems like a good time to demand a quid pro quo in the shape of repealing the foolish overprotection of historical sound recordings.

# Suddenly, Open Access is all the rage.

*Thu, 14 Feb 2008 10:04:30, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

In December the National Institute of Health made public access to research articles that grow out of NIH funded research mandatory; research are now required to place their final version of articles accepted for publication after April 7 into the PubMed Central database at NIH within one year of publication.

This was a victory for many library and higher ed. advocates of public access, but there is a certain element of “be careful what you wish for” here. Many campus are now scrambling to figure out the legal, practical and financial implications of complying with this mandate. Three issues must be addressed in a relatively short time frame.

1. How will authors manage their copyrights to comply with the mandate? It has long been important for authors to think about and negotiate for an appropriate copyright arrangement with publishers. Insofar as this mandate forces them to do what they ought to have been doing for years, its impact is salutary. But it will still come as a shock to many researchers and will increase the need for sound copyright guidance and policies on campuses.
2. How will campuses deal with the mechanics of deposit? Since lack of compliance could imperil future research funds, this is an issue which should not be left entirely to individual authors. Institutional repositories, where they exist, are in a good position to help with the mechanics of deposit, and library staffs will also need to be aware of the process and ready to assist. Although the process is not hard, and is easier to accomplish if the author is involved, it is clear that institutional guidance and assistance is called for.
3. Likewise, researchers will need assistance locating and tracking the PubMed reference numbers of their articles that are deposited with NIH. Starting with the May round of grant funding, NIH will require that these numbers be included as part of the investigators previous work with NIH when applying for renewals or new funding. Again, libraries are in the best position to help researchers locate and retrieve this information.

Hard on the heels of this public access mandate came [news of the vote this week by the Harvard faculty](#) to require deposit of all articles written by the Arts and Sciences faculty in Harvard’s own institutional repository. The faculty agreed unanimously to automatically grant to Harvard a non-exclusive license to their work to put those articles in the repository; authors retain copyright and are free to publisher their work anywhere they lack as long as the publisher will accept that copyright is subject to this prior license. The decision is a strong affirmation of the value of open access to academic research, both to the public and to the academy itself.

Lots of commentary on these two decisions is available. This [comment by William Patry](#) addresses both, and there is an excellent roundup of information and comment on the Harvard decision [here on Open Access News](#) and on [Mike Carroll’s blog here](#). I have written about the NIH mandate [here](#).

Have we arrived at a “tipping point” for open access? At the very least, these developments are a great opportunity to begin or deepen a campus conversation about open access — what it is, all the different

whys it can be accomplished and, most importantly, why it is so important, both in our own best interests in higher education and in the public interest.

# Silly copyright reform and its serious implications.

*Thu, 21 Feb 2008 10:02:32, ksmith12@duke.edu, [category: copyright-issues-and-legislation]*

On February 11, Senator Arlen Specter (R-PA) introduced a very specific reform measure for the US Copyright Act — a [bill that would add to the exceptions to the public performance rights a special provision to allow churches to host Super Bowl parties](#).

Senator Specter is justifiably angry at the NFL for intimidating churches that want to host parties where folks get together, often share a meal or heavy snacking, and watch the big game. Some churches also use the events as an opportunity to raise money for various causes (like the “Souper Bowl” movement to assist community food pantries) or to have Sunday evening services. For several years the [NFL has sent letters to such churches](#) telling them that the parties infringe rights in the trademarked name “Super Bowl” and in the NFL’s copyright in its broadcast.

So Senator Specter has introduced an amendment that would allow only churches, based on a definition in the IRS code, to host viewings of “professional football contests.” Presumably a World Series party would still be potentially infringing, as would a party held at the local Elks or Kiwanis club. His anger is justified, but his narrow solution makes the legislation look silly and like special pleading. What is needed is a more comprehensive reevaluation of the copyright exceptions with a eye to the foundational purpose of copyright law.

The question that should be asked is “if the exclusive right is intended to provide an incentive for creativity and innovation, does this exception put that incentive at risk?” When the answer is clearly no, as it is here, the correct approach is to determine how broad the exception should be based on the public interest to be served, not to craft a narrow exception to penalize over-reaching, however satisfying that punitive urge may seem.

Here, the ridiculous claims of the NFL seem to be unrelated to any incentive to create new TV broadcasts. The same number of eyeballs, if not more, will witness the advertising that is the true purpose, and often the true entertainment value, of a Super Bowl broadcast. And there is no indication that the NFL or the networks are trying to extract a licensing fee from the churches that host these parties. But if restricting the viewing of broadcast TV to personal homes and a few closely defined exceptions does not serve an incentive purpose, why are we doing it at all? Why not recognize that sporting event parties, “Sopranos” get-togethers, and lots of other gatherings to watch TV that seem like public performances, pose no risk to the reasoning behind copyright law and simply ought to be allowed? Instead of punishing the NFL, however much that punishment is earned, lets take the opportunity to discuss whether the public performance exceptions ought to be much broader than they are in order to serve legitimate public interests.

# The discordant argument for harmony

*Mon, 03 Mar 2008 08:04:23, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

Last Monday, in his regular [column for the Financial Times](#), James Boyle discussed the ubiquitous argument that copyright laws should be harmonized around the world. Often phrased as a argument about competitive advantage, the call for harmonization, Boyle points out, only goes in one direction — upwards. No one ever asks that the laws be harmonized downward in favor of lesser protection, even when there is substantial evidence that copyright protection is now far more restrictive and protective than is necessary to accomplish the purpose for which it is intended, to provide incentives for creation. As Boyle indicates, copyright has become an “evidence-free zone” where the mounting number of studies that suggest that we are over-protecting intellectual property in a way that actually discourages and depresses creativity and innovation are consistently ignored. One economic study that Boyle cites, for example (and that I [have mentioned before](#) in this space), finds that the optimal term of copyright protection is only 15 years, not the average term we now have of approximately one-hundred years.

As if on cue, another industry lobbying group, dressed up as a think-tank, is touting their latest argument for additional protection; the [Progress and Freedom Foundation wants to extend the performance right](#) in US Copyright law to include recording artists. The principle argument for this grab at additional royalties, of course, is that other countries give recording artists such a right, and the laws ought to be harmonized. No thought is given, of course, to the possibility of seeking harmonization by lobbying other countries to drop this particular right, even though its absence in the United States is not shown to have done any harm to our recording industry. The argument that radio play is an economic benefit to the recording industry is dismissed as irrelevant, proving Boyle’s point about the fear of actual evidence.

Until legislators start to demand hard economic evidence for the changes they are asked to make to intellectual property laws, we will [continue to have this game](#) where lobbyists convince one nation to adopt a stricter IP regime than the rest of the world, then try to force that regime down everyone else’s throats in the name of harmony.

# Freeconomics

*Thu, 06 Mar 2008 07:50:35, ksmith12@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

What a delightful word to describe the increasing need to talk about the economics of free stuff. As strange as that idea sounds, it is the subject of a recent article in Wired magazine called "[Free! Why \\$0.00 is the Future of Business](#)." Besides coining the word "freeconomics" (as far as I know), author Chris Anderson describes the forces that drive prices in the digital world down toward nothing. He identifies two important trends that tend to make the Web "the land of the free."

First, there is the phenomenon of "cross-subsidies," where a product or service is given away for nothing in order to create an income stream somewhere else. Anderson uses the example of King Gillette, who gave away his safety razors in order to get men hooked on using them and to make money selling the disposable blades. As Anderson points out, the Internet provides greater freedom for businesses to make money from one set of customers while giving things away to another. Advertising supported Web business are only one of many examples.

The other trend Anderson identifies is "simply that anything that touches digital networks quickly feels the effect of falling costs." He provides a nice discussion of why the cost of Internet communication is approaching or has reached the point where it is close enough to free so that we can "round down to zero."

Anderson's article ends with a "taxonomy of free" that describes five business models built around a base price of zero.

What has this to do with scholarly communications? We are already seeing the pressure towards free for all kinds of intellectual property on the Web. Music, of course, was the first IP commodity to head to zero, and it did so before distributors could catch on and move to a zero-based business model. Now the music companies are scrambling to find ways to add value to music in order to move customers back from the lure of \$0.00. That is a very difficult task, needless to say.

As the same pressures are exerted on digital scholarship, those who make that scholarship available, whether traditional publishers, libraries or individual scholars, need to plan ahead for how they will at least recover basic costs as the price of access falls. If we sit on our hands and deny that this is happening, we may well witness "the end times for tradition journal publishing," as was recently [predicted in Inside Higher Ed](#).

The issue is going to be how to add value to what could be obtained for free, in order to recover costs. To guide us, here is one more article about "freeconomics" — In "[Better than Free](#)," Edge columnist Kevin Kelly suggests eight "generatives" that can move a product past free to a point where consumers will pay something, not for the product necessarily, but for the value that comes with it. Kelly's discussion of these "generatives" — immediacy, personalization, interpretation, authenticity, accessibility, embodiment, patronage and findability — should be required reading for those who advocate, consider or foresee that move toward free access to scholarship. Even if we fear it, we are likely to have to deal with it. The ability to add value along the lines that Kelly suggests may keep us and the scholarly apparatus we have grown familiar with over the years afloat in the age of freeconomics.

# Copyright Reform Suggestions, part 2

*Fri, 14 Mar 2008 08:49:22, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management, category: fair-use, category: uncategorized]*

They are almost five months old but now, and I meant to point them out a long time ago, but the [six-point proposal for copyright reform](#) released by [Public Knowledge](#) is well worth reading, studying and mailing to your local Congressman.

As has been said before on this site, it is probably passed time that our copyright law be thoroughly revised and made flexible enough to address new technologies that have come into existence since 1978 as well as to anticipate and accommodate those that have yet to be invented or widely-used. But there is not a lot of political will to undertake a comprehensive copyright reform these days, and the overwhelming influence the biggest content companies seem to wield with major players in Congress suggests that comprehensive reform might do more harm to the interests of consumers and, especially, educators, than good. Until we can reasonably hope for through-going reform in a positive direction, the kind of incremental changes suggested by Public Knowledge seem like the best direction to focus our energies. Although it is fair to call these proposed reforms “more modest,” some of them would be quite radical in practice.

Two of the suggestions made by Public Knowledge will be quite familiar to those who follow copyright issues — fair use reform that would make the four factor test more usable and sensible in today’s digital environment and orphan works legislation to reduce the risk of making productive, socially beneficial works that are not currently subject to commercial availability and whose rights owners are AWOL. One proposal that I have not written about before in this space, but have discussed elsewhere, is that copyright holders should be required to give notice to consumers whenever they are imposing contractual or technological restrictions on a work that takes it outside of the uses reasonably expected under copyright law with its exceptions, including fair use. The principle that consumers should know what they are buying and whether they can use it for reasonably foreseeable purposes is actually quite basic in our commercial law, and neither contracts nor DRM systems should be allowed to defeat reasonable expectations of a purchaser without prior notice.

All of these suggestions — the remaining three are limits on secondary liability, protections against copyright abuse and simplified, fairer licensing rules — deserve our attention and support, at least until a more comprehensive and fair reform of copyright seems possible.

# Turnitin and hold your nose

*Thu, 27 Mar 2008 11:42:37, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: technologies]*

I have been very neglectful of posting for the past two weeks, mostly due to the pressures of other work, but the attention paid to the recent court decision involving the online plagiarism detection service Turnitin has finally provoke me enough.

Turnitin is a web-based service that compares submitted papers to vast database of essays available on the web and it is own proprietary database. It offers instructors a report on how likely it is that the given paper is plagiarized. Four high school students from Virginia who were required to submit their work to Turnitin or get a zero challenged the company in court. The district court's opinion, dismissing all of the students claims, was issued March 11 and has provoked a lot of reaction, The Chronicle of Higher Education has [a story about those reactions here](#), and William Patry discusses several aspects of the case in his blog post called "[Turn-it-it and Kiss-it-goodbye](#)."

One aspect of the decision worth mentioning is its discussion of the claim that Turnitin infringes copyright because it adds a copy of every paper to its database as soon as the paper is submitted so it can be compared to later submissions. The plaintiffs tried to prevent this by indicating their lack of consent to have their work copied in this way on the papers they submitted, but the court found that the click-through contract they were obligated to agree to in order to submit in the first place took precedence. More on that in a moment. On the copyright issue, the court found that the company had a valid fair use defense regarding their storage and use of student work, even if the contract giving them permission had failed (which it did not).

I have been torn about the fair use analysis the court used in this case. I have a hard time justifying to myself the business model Turnitin use, although my doubts are likely bound up with broader concerns about this kind of attempt to use technology to force people to behave with integrity. But, to my mind, Turnitin's business model is as dependent on infringement as is Grokster. The district court disagreed, finding that Turnitin made a transformative use of the works it archived for later comparison. What strikes me most about this decision is the way "transformative use" has become a talisman, invoked whenever the court wants to find fair use. The copyright statute seems to indicate pretty clearly that even non-transformative uses can be fair use, but courts are now so enamored with the notion of transformation that they are now finding it even in unlikely situations because it has become the sine qua non of fair use. This is both good and bad for higher education; some educational uses of copyrighted works seem to be purely iterative, not transformative, and fair use in those cases seems increasingly hard to argue. On the other, the more the concept of transformative use is expanded, the better it will be for educational; some of those uses that don't seem transformative to me may well seem so to our courts.

The other, more troubling aspect of the Turnitin decision was the court's attitude to the click-wrap license. The plaintiff students had no choice but to click through the license; they faced a zero if they didn't and there was no way to communicate with Turnitin until they had accepted the license. Nevertheless, they tried to make their objection to the term that allowed Turnitin to copy and save their work as soon as possible; they included a notice with their paper that said they did not consent. Tough luck, said the court; you agreed to the license and you have to live with it. This strict enforcement of a "take it or leave it" license even when the party on whom it is imposed objects in a timely way seems to



make a mockery of the notion of a contract as a bargain that may be “unconscionable” if there is no meaningful chance to negotiate.

If we need further confirmation that the court was aiming at a particular result and disregarding a reasoned discuss of the law, there was its astonishing dismissal of the plaintiff’s argument that, as minors, contracts they entered into are voidable. The court recognized that this was the usual rule in contract law, but said that the plaintiffs could not avail themselves of it because they had accepted the “benefits” of the contract. What benefit had they accepted, I wondered. Standing to sue, the court replied, the right to bring the case to challenge the contract itself. By this logic, of course, no contract could ever be challenged on the basis of “infancy.” Such absurd and circular reasoning can only serve, as Bill Patry says, to increase the cynicism so many people feel toward our courts.

# Limitations and exceptions

*Mon, 07 Apr 2008 10:45:30, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

Are getting a lot of attention lately. This is the phrase, used primarily in international copyright discussions and negotiations, to refer to the many compulsory licenses, declarations that an apparently infringing act will not be considered infringement, and restrictions on when a copyright can be claimed that make copyright material usable, to a degree, by the rest of us. Without limitations and exceptions, the exclusive rights granted by copyright would frustrate copyright's fundamental purpose to encourage progress and creativity. It is one thing to guarantee a financial incentive for intellectual creation, but if that creation cannot be used by others, innovation grinds to a halt.

That is why so much of the Copyright Act is dedicated to exceptions to the exclusive rights. In the Government Printing Office edition, over one-third of the text is dedicated to sections 107 through 122, which incorporate most, but not all, of the limitations and exceptions.

In international treaties, the limitations and exceptions to copyright are supposed to be subject to a "three-step test" which has its origin in the Berne Convention, initial adopted by many countries (but not the US) in 1886. The US joined Berne in 1988 and oversaw its incorporation into international trade law in 1994. As it now stands, the three step reads like this:

Members shall confine limitations and exceptions to exclusive rights to **certain special cases** which **do not conflict with a normal exploitation of the work** and **do not unreasonably prejudice the legitimate interests of the rights holder**. (Art. 9(2) of Berne and Art. 13 in the TRIPs Agreement)

It is an interesting question whether some of the exceptions in the US Copyright Act violate this three step test — does fair use apply only to special cases, for instance, or conflict with normal exploitation of a work? The recent emphasis our courts have placed on transformative use as the sine qua non of fair use may be a direct reaction to this three part test.

So far, only one provision of the US Copyright Act has been found to violate the TRIPs three step test — the section 110(5)(B) exemption for businesses that allows installed TV sets and radios to "publicly perform" copyrighted works for patrons of those establishments. As interesting as that case is, the discussion of how fair use fits into this framework is even more interesting and important. A recent [blog post by William Patry on this subject arguing that fair use does not violate the three step test](#) is a great primer about this discussion.

Other attention to limitations and exceptions include [this discussion of a proposal made to the World Intellectual Property Organization](#) for a formal discussion and agreement about limitations and exceptions, something the US says it is not ready for. Closer to home, of course, is the recently released [report by the Section 108 Study Group](#), proposing changes in the US copyright exception that permits library preservation work and interlibrary loan.

Most exacting, from my point of view, is this full-day conference being held at Duke Law School this Saturday on the topic of "[Copyright Limitations and Exceptions: from access to research to transformative use](#)." There will be an exciting group of scholars from the US and European here to discuss the various issues and problems, with a focus on practical strategies to encourage creative uses of digital content. I hope any readers who are close to the North Carolina Research Triangle will consider

attending this conference, and that those who cannot will look for podcasts, which are often posted by the [Center for the Study of the Public Domain](#).

# A model for academic publishing

*Mon, 14 Apr 2008 09:52:20, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

Last week [BioOne](#) unveiled its new “Model Publication Agreement,” with an [announcement that ought to generate more attention](#) than it has. BioOne is “a collaboration between scientific societies, libraries, academe and the private sector [that] brings to the Web a uniquely valuable aggregation of the full-texts of high-impact bioscience research journals.” The decision to create a model publication agreement grew out of the perceived need to help some of its publishers, especially the scholarly societies, deal with the legal complexities of publishing in the digital age. The model agreement was drafted for BioOne by an attorney for an intellectual property firm in San Francisco, and it represents a superb and realistic balancing of the needs of author’s and academic publishers.

The core of the [model agreement](#) is a double license; the author grants to the publisher both a time-limited exclusive right of first publication and a perpetual, non-exclusive license to publish, distribute and sublicense. Subject to these two licenses, copyright is retained by the author. The model agreement contains a number of options or “fill-in-the-blank” points where publishers can customize the license to fit specific conditions. As an attempt to lower the transaction costs associated with publishing, and as an equitable balancing of needs that do not have to be in permanent competition, this is an excellent model to be followed in academic publishing.

It is unfortunate but predictable that one of the most immediate responses from the publishing community was a very revealing demur to the BioOne model agreement project. A university press director posted his objections within two days of the announcement; his position that the agreement is inappropriate even for academic publishers exposes the growing gap between academic publishing and the values of the academy that supports it.

One complaint is that, without an exclusive right in the published works, the publisher will have no standing to sue putative pirates who want to steal academic work. First, we should note that there will still be a rights holder under the model agreement who can enforce the copyright — the author. The problem is that the author’s interests not only do not coincide with the publisher in some cases, they sometimes conflict. The objecting press director notes that the author may actually benefit from wider distribution by a “pirate,” so one wonders why authors should continue to sign away copyrights to organizations who want to wield them as litigation weapons contrary to the authors’ interests. Copyright is supposed to be an author’s right; its genesis as a publisher’s right (associated with their role in censoring unpopular content) is centuries out of date.

And this brings us to the second revealing question about this objection — who are the pirates we are supposed to fear enough to give up copyright entirely to publishers? In fact, the only “pirates” against whom publishers tend to threaten litigation are the authors themselves and their institutions. The “theft” these publishers want to control is faculty authors passing out copies of their work to their own students or to others on campus, to their colleagues at other institutions, and via their websites. No one seriously expects large-scale republication of scholarly content for profit; all that is being defended by these grabs for exclusive copyright transfer is the traditional, and increasingly expensive, subscription model of access. If there is real danger that subscriptions will be canceled because authors retain their own copyrights, and this has never been shown to be the case, all it would illustrate is that this traditional business model has run its course and no longer serves the interests of those it was created by and for.

The [Ithaka report on university publishing](#) asked presses and their parent institutions to reexamine how well publishing is integrated with the interests and values of the academy and the specific university. The BioOne Model Publication Agreement can help advance that integration, and objections to it are a profound illustration of the problem we need to address.

# Trying to sue State U

*Wed, 16 Apr 2008 15:15:23, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: scholarly-publishing]*

Two interesting lawsuits came to my attention recently, one decided in February by the federal district court in Los Angeles and the other just filed in the district court in Atlanta. The new case involves a [challenge by three publishers to the electronic reserves practices at Georgia State University](#), so it has direct relevance for many of the readers of this blog. But taken together with the LA case, there is a fascinating question raised about whether it should be possible to sue state institutions for violations of federal law.

The case out of California, [Marketing Information Masters v. the Board of Trustees of California State University](#) reaches a rather predictable result in dismissing an allegation of copyright infringement on the grounds that states and state institutions are immune from lawsuits by private individuals and corporations. Congress has tried to change this doctrine in regard to copyright by adopting section 511 of the Copyright Act in 1994, but the courts keep brushing that provision aside. William Patry comments negatively on this trend [here](#), while Georgia Harper partially defends it [here](#). But what is really interesting is that the district court in Marketing Information Masters allowed the suit to go forward after dropping Cal State as a defendant by leaving intact the claim against the specific university employee named in his individual capacity. Pretty frightening stuff for state university faculty.

If we now flip forward to the suit filed yesterday against Georgia State University, we have to wonder if the same sovereign immunity problem will lead to dismissal. The four university officials are named only in their official capacity; no one claims they actually infringed copyright themselves. So how will this case avoid being dismissed? The answer seems to be in one of the few exceptions to sovereign immunity, the doctrine that one can sue state officials in their official capacity if one is seeking only injunctive relief — an order to stop the infringing activity — rather than money damages (the [Ex parte Young](#) doctrine). The complaint filed against GSU takes exactly this tack, seeking only an injunction to stop the activity going forward, not damages for alleged infringement in the past. On that basis, we might actually get a decision about the meat of the claim, that electronic reserves are almost always infringing if the universities do not pay for permission.

This claim, if successful, would increase student costs for educational materials dramatically as schools would have to pass on the costs for permissions in addition to the money already spent when they financed the original research, purchased the resultant articles and then, often, purchased them again in digital format. If publishers get their way a fourth payment would be required, and it would come straight out of students' pockets.

The complaint against Georgia State acknowledges fair use, as it must, but it relegates it to a tiny fraction of situations, none of which can realistically be expected to occur on a modern college campus. In effect, this is an attempt to enforce judicially a "pay-per-use" model of content distribution. The real irony is that it is justified as an attempt to remedy a "free-rider" problem — the claim that universities are appropriating the work of publishers and authors without just compensation. This claim is patently absurd, given the amount of money university libraries invest in published resources, but it is downright offensive when the real issue is clarified. Publishers here are themselves the free-riders, obtaining a huge amount of academic content from the universities and their faculty without compensation. The GSU complaint cites as an irony the fact that one of the professors who is cited as infringing the copyright of Sage Publishing has himself published three articles in Sage journals. The gall of the man!

Nowhere is it mentioned that he was required to give up those articles without payment for the privilege of publishing with a company that is now suing his employer to recover even more money for those freely donated articles.

A little bit of attention to the economics of scholarly publishing quickly undermines the claim in this complaint that, without permission fees for electronic reserves, the incentive system of copyright will be undermined. No monetary incentive currently exists for the vast majority of academic publishing, from the point of view of faculty, yet academics keep writing. There is no evidence at all that this well of free content will suddenly go dry if publishers are not able to collect an additional income stream from that well. If this suit goes forward in spite of sovereign immunity, that should be the issue on which the court focuses its attention.

# How bad are the proposed Orphan Works bills?

*Mon, 28 Apr 2008 18:49:36, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

Two proposals on Orphan Works were introduced in Congress last week, [one in the House of Representatives](#) and a [slightly different one in the Senate](#). Both bills are more complex than the version introduced and then largely ignored by the 109<sup>th</sup> Congress, but the core principle is the same — a remission of most of the available remedies for infringement if a user makes use of an orphan work (a work whose copyright owner can not be found) after a reasonable diligent search. The bills are designed to greatly reduce the risk for libraries and many others who want to make digitized versions of older, but still copyright protected, works available to the public. In some sense it is an attempt to balance the outlandishly long term of copyright with the reality that a huge percentage of works are not economically exploited at all after their first few years of existence.

The big question is whether either bill actually succeeds, with success defined as a reasonable likelihood that a thousand flowers will bloom from the soil of orphaned works that otherwise would not have been seen for many more years. Opinion in the blogosphere is mixed; [Public Knowledge, which was deeply involved in helping to draft the bills, is guardedly hopeful](#). Georgia Harper, on the other hand, writes [this deeply pessimistic blog post](#) that declares the bills “DOA. Too late even for last rites.” The issue, as I will discuss it, revolves around how burdensome it would be for libraries to actually rely on the procedure outlined in the bills to support digitization projects. Three issues seem to need discussion.

First, there is the requirement in the House bill that users of orphan works file a “Notice of Use” with the Copyright Office that would be maintained in a “Notice of Use Archive.” The notice would have to contain a description of the search for an owner that was made by the user, as well as lots of identifying information and a certification of good faith. This requirement is only in the House version, and it renders the Senate version much more appealing. A database of uses raises the specter of copyright owners fishing for defendants in a stocked pool, for one thing. But, realistically, this seems pretty unlikely. First, access to the database would be restricted by unspecified regulation of the Copyright Office. More importantly, if a diligent search really has been made (and libraries almost certainly would be doing so) most copyright owners who would be on the lookout for infringement would have been found. More problematic is the burden of fulfilling this requirement, a burden that would be hard to measure until (and if) a version of the bill with this requirement is in place and being used.

I certainly would rather this not be included in a final bill. But I also know that librarians are investing a lot of time, labor and money in digital collections as things stand now. I doubt that even a burdensome reporting requirement will discourage the commitment to greater access that drives these projects, especially when the content is something that could genuinely benefit scholarship and that has been previously unusable.

A second potential problem is the instruction to the Copyright Office to develop “best practices” for different kinds of content that would have to be followed for a search to qualify as reasonably diligent. Georgia Harper thinks this is a guarantee that the content industries will write the rules, and she may be right. Unlike the case of proposed file-sharing legislation, however, such a role for industry is not actually specified in the bills. In any case, I think most librarians working on digital projects would welcome the guidance of best practices, even if the door to using orphan works were opened only a



little bit. So much of our collections are unavailable for use as things now stand, and we have such high certainty that many of those works genuinely have no one to care about how they are used, that even restrictive rules for a qualifying search would advance the cause of digital access. Again, I think many libraries will take the necessary trouble when the content and the opportunity seem worthwhile. Restrictive rules will help only small digitization projects, of course, which may be the point, but even so the digital environment could be greatly enriched.

Finally there are the added rules for pictorial, graphic and sculptural works. These are the categories whose owners have most vocally opposed orphan works reform because they fear that it will be too easy to call these works orphans. The problem is that most such works carry no obvious notice of the copyright owner. The proposed bills specify that this lack by itself does not make the work an orphan, and it directs the Copyright Office to certify a database “to facilitate the search for pictorial, graphic, and sculptural works that are subject to copyright protection.” Such a database would actually probably be welcomed by libraries, since it would both facilitate use of orphan works and provide a source for needed metadata. The big problem is that such a source does not seem to exist right now, and creation of it would delay implementation of the orphan works exception for as much as 5 years. Since images and graphical works are a large part of the collections libraries would like to digitize, this kind of delay would be a huge blow to the effort to give the public access to much of our unexploited cultural heritage.

Even with all these restrictions and potential problems for using the orphan works mechanism, I am inclined to think of these bills as half-full glasses. For one thing, it has been a long time since a genuinely user-centered proposal has even been considered by Congress. Also, this is a rare situation where libraries, higher ed., publishers and the recording industry have worked together and agreed on a reform regarding user rights. One might suggest, cynically, that the content industries only agreed to these proposals because they have been made too complex to be usable. But I do see potential uses here, based on the kinds of things I am asked about, even if only for a subsection of textual works that really are easily established orphans. If the provisions for pictorial and graphic works are long delayed, we will be no worse off than we are now. The only real downside would be if we accept this bill while a better alternative is possible, and regarding that possibility I agree with Georgia that no one should hold their breath.

# Access to legal scholarship

*Mon, 05 May 2008 19:37:40, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

I have written several times before about scholarship in the field of law ([here](#), for example, and [here](#)). For a variety of reasons, legal scholarship is an excellent laboratory for experiments in changing the traditional structures and economics of scholarship. Both open access and informal forms of scholarship have been more readily adopted and more quickly influential in law than in other fields. The unusual structure of most legal scholarship is a partial explanation for these facts, but many of the experiences and observations made in the legal arena offer substantive lessons for scholarship in other fields.

Nowhere are these experiences and observations better synthesized than in a recent article by Richard Danner, Ruffy Research Professor of Law and Associate Dean for Information Services at Duke University Law School. In "[Applying the Access Principle in Law: the Responsibilities of the Legal Scholar](#)," Danner does a superb job of explaining what is unusual about legal scholarship, what the experiences of changing the publication models have been and what needs and responsibilities for individual scholars remain.

One of Danner's observations particularly struck me when I read this article, and that impression was confirmed by a conversation I had this week with several librarians. Contrary to the oft-repeated claim that open access will inevitably lead to loss of subscription income for publishers, Danner documents the experience of Duke Law School when it moved all of its journals to open access web accessibility. As Danner tells the story, the school had concluded that the expected loss of subscription income would be offset by the values gained from greater exposure to its 6 print journals. But in fact, there was almost no such decline in print subscriptions, even after 10 years of free access. Only one journal showed an overall decline (of about 2%) over that time period, while four showed significant increases in subscriptions. The sixth journal experienced a small increase. Clearly better access leads to subscriptions from readers who otherwise would not have known about the journals, especially the specialized ones, which exhibited the largest increases. This week a librarian I was speaking with confirmed that she had also experienced this unusual form of marketing, when faculty have asked her to subscribe to journals they have discovered through open Web accessibility.

Overall, Danner's article is a masterful analysis of the structure of publishing in a particular field and how the "access principle," a concept taken from John Willinsky's book of the same name, could transform a field of scholarship. In spite of the oddities of legal scholarship, Danner is very successful at offering both an analysis and a call to action that deserve to be translated and applied in other fields.

# Happy Birthday and the best interests of orphan (works)

*Fri, 09 May 2008 16:30:07, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

I have been traveling a lot recently, and I use time on airplanes to catch up on articles I want to read. As always, [Bill Patry's blog](#) is a great source for citations to interesting topics, and I was particularly taken by an article he recommended recently — "[Copyright and the World's Most Popular Song](#)" by Robert Brauneis of the George Washington University Law School. Brauneis' article is a great airplane read; a tour de force of historical research and reasoning that dissects both the history of the song "Happy Birthday to You" and the persistent claim that the work is still protected by copyright. His detailed discussion of the tangled history of authorship and its relation to the various copyright acts and ad hoc term extensions that occurred since the original composition of the tune (at least) in the 1890s beautifully illustrates how difficult establishing the status of older works is now that copyright term has grown so long, well past the memory of any person alive at the work's creation.

This problem of establishing the rights in a very old work makes Brauneis' article especially interesting at a time when Congress is considering ways to address the issue of orphan works — older works that are still protected for which no rights holder can be found. Brauneis mentions the orphan works proposals only in passing, but his investigations, and the lessons he learns from those inquiries, help clarify why orphan works are so problematic and suggest new directions for consideration of those problems.

First, as should already be clear, there is the problem that, as copyright term gets ever longer, it becomes harder and harder to identify authorship, trace rights, and even verify if the correct rights holder registered the work (this is very significant for works protected under the 1909 copyright act, but it could also be important if an infringement action were brought regarding a more modern orphan). For the song "Happy Birthday to You," Brauneis is dealing with a relatively small and identifiable group of authors, yet the problems of identifying who wrote what and who should have registered which works are very knotty indeed. For genuinely orphaned works, these problems only multiply. As Brauneis points out, the rather scanty record-keeping efforts of the Copyright Office contribute to the difficulties in this area. He holds out hope for more comprehensive record retention in the digital age, although that is happening very slowly, and it is worth noting that the orphan works proposals also contain some requirements of additional recordkeeping to make diligent searching for rights holders a little bit easier.

Brauneis also notes the disincentives that are present to discourage potential users from challenging a dubious claim to copyright. In the case of "Happy Birthday to You," there is substantial evidence that the song is not protected by copyright any longer, in spite of the myth, ubiquitous in copyright discussions, that it is. Nevertheless, the song generates \$2 million in royalties for the company that claims to hold the rights. Since no single user pays a great deal for the rights, the users have little way to identify each other or act in concert, and blanket licenses make it difficult to distinguish exactly what one is paying for in any case, the song continues to generate a great deal of income and the public is denied a small but popular piece of its cultural heritage. This is not quite the same problem, of course, as that which prevents use of orphan works, but it is another example of structural difficulties in copyright that stifle creativity and learning.

Finally, Brauneis makes a fascinating point about the lack of any mechanism in copyright for obtaining the kind of prescriptive rights that are available for persistent (mis-)users of real property. When a trespasser uses land in a way that is continuous, open and "notorious" for a number of years, they may

gain a prescriptive easement to use the land or even take title through adverse possession. When a copyright owner fails to enforce his or her rights, however, even if it fears that those rights would not stand up in court, no such legally cognizable rights are gained by the user. While one user may “infringe” without consequence (as many appear to do with “Happy Birthday to You”), the putative rights holder may continue to collect royalties from all those others who do not know about the dubious claim. All of the solutions proposed for the orphan works problems are merely attempts to mitigate the consequences for a potentially infringing use by reducing the available damages; Brauneis’ article raises the fascinating suggestion that that problem and others might be better addressed by allowing users to gain a legally recognized right in a work when and if they use that work in an obvious and long-term way and the copyright owner elects, for whatever reason, to “sit on her rights.” Such a solution would certainly expand the cultural commons, although it might be useful in only a relatively few situations where the risk of litigation from a rights holder was very slim ( thus a “reasonably diligent search” would still be necessary). Most promising, however, is Brauneis’ comment that this kind of prescriptive rights approach to the problem of missing or inactive rights holders could be imposed judicially, rather than having to depend for a solution on a distracted and easily influenced Congress.

# “It’s the links, dummy”

*Thu, 24 Apr 2008 21:27:40, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: scholarly-publishing]*

Events of the last week have delayed me from writing about a conference held at the Duke Law School on April 12, but I do not want to forget to share what was a very exciting and stimulating experience. Scholars from the US and the European Community gathered to discuss “[Copyright Limitations and Exceptions: from access to research to transformative use](#).” If I had any criticism of the conference, it was that too little time was actually dedicated to discussing the legal details of limitations and exceptions to copyright law under the [Berne Convention](#) (especially article 9(2)) and the [TRIPs agreement](#). But that flaut, which would bother only a small number of fellow copyright geeks, was more than made up for by the presentation about what exciting new possibilities copyright limitations and exceptions, if handled properly, could foster for scholarship.

The quote in my title came from Prof. James Boyle of the Duke Law School, explaining how the very links that create value on the Web are still illegal for much of scientific literature, even when the texts are available in digital form. To use an image suggested by another Duke Law professor, Jerome Reichman, the “web” of science today resembles the Rhine river in medieval times — it is so clogged with demands for toll that progress is impeded. Just as merchants had to stop over and over again to pay each castle owner in order to be allowed to continue sailing the river, today researchers must stop at innumerable “toll gates” to gather the research they need. This is why, as Boyle said, “a picture of an article” is not enough; what scientific research needs is a “semantic web” of linkages that allows research to be structured and shared. Boyle explains this concept, and the legal and economic obstacles to it, in this column from the Financial Times, “[The irony of a web without science](#).”

This concept of a true “web of science” was developed more fully by John Wilbanks of the [Science Commons](#). He demonstrated very compellingly the vastly wasteful research process that is determined by the siloing of research as it now exists on the web by show how one would approach the task of finding research about a particular protein in various databases, including Google and PubMed. Then he showed what a true semantic web approach could produce; a much more targeted and efficient search, even when conducted (as it currently must be) over a relatively small field of content. His conclusion was that keyword searching is less and less useful for research in the life sciences and that the use of “ancient tools” like Google for such research is largely dictated by the access restrictions created by an outmoded system of law (copyright) and an outmoded economic model for publishing. Finding ways to loosen the stranglehold of copyright law over the research web should be a primary goal of all discussions of copyright limitations and exceptions, while the search for new ways to disseminate scholarly research should occupy the attention of every scholar who hopes to take advantage of the tools offered by the 21st century.

# Getting off the copyright merry-go-round

*Sat, 17 May 2008 15:37:31, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Congress has been talking a lot recently about the farm bill and war spending. But amidst all that rhetoric and wrangling, some copyright work has also been done in the past two weeks. For one thing, the House passed the so-called PRO-IP bill last week, fortunately without its most troubling provision. One of the major provisions of that bill as proposed was an amendment to the copyright law that would have allowed much larger damage awards for infringement. [As I wrote some while ago](#), this was a huge grab at more money for the recording industry especially, but that provision was dropped in the House-approved version. Now what PRO-IP would largely do is further bloat the federal bureaucracy (in a way opposed by the Justice Department) for IP enforcement.

Perhaps balancing out this sop to special interests, Congress has also been [working on the Orphan Works bills, discussed earlier here](#). The Senate version, called the Shawn Bentley Orphan Works Act, was unanimously reported out of the Judiciary Committee on May 15, although it is clear that negotiation about some of its provisions is still going on. The House version, which includes the objectionable “dark archives” provision, is still being marked up in the House Judiciary Committee; whether that provision will remain is something I just don’t know right now. But I do know that several issues remain in controversy in both houses, specifically the language addressing state sovereign immunity and the role of Copyright Office certified statements of “best practices” in defining the scope of a “qualifying search” that would afford a user the shelter of the orphan works reduction in liability.

Amidst all this give and take about copyright, the question ought to be asked whether any of these incremental changes will really make much difference. From the perspective of higher education, at least, there is a sense of tinkering around the edges of a severely broken system. PRO IP simply creates more bureaucracy and further trumpets the “sky is falling” approach to copyright of the entertainment industry. Orphan works is an area in which real reform is sorely needed, but one can legitimately ask if the bills being considered would actually work; the bills may be so laden with expensive and unnecessary hoops to be cleared that they will not make truly beneficial uses of orphan works any more possible or likely. Another example of this futility may be found in the recently concluded work of the Section 108 Study Group: although the Study Group’s report raises some interesting and key issues, it was only able to reach agreement to actually recommend minor changes that will not make much real difference. Instead of waiting for reforms that never come in any helpful way, it may be more fruitful in higher education to ask ourselves how we might simply get off the copyright merry-go-round.

The answer, of course, is in open access to scholarship, and there may be some recent developments that point a direction for encouraging open access as an alternative to the current system of copyright protection for commercial monopolies. An [article in this month’s College & Research Libraries News by David Lewis](#), Dean of the Library at IUPUI, forcefully asserts that it is time for libraries to stop putting more and more money into the bloated and dysfunctional journal publishing system and to move funds to support open access infrastructure and venues. His article proposes specific steps that libraries can take to move off the endless cycle of higher journal prices that leads to less money for monographs and overall reduced access. He is suggesting an important step to get us off the copyright merry-go-round.

A major obstacle to open access, however, has always been resistance from faculty, for whom the system usually seems to work just fine. Tenure and promotion have been built around the core of commercial publishing, and it is very hard to communicate the reasons for moving away from that core.

Until now. With the lawsuit filed against Georgia State by three major publishers, a real opportunity has arisen to show faculty members that giving copyright away to publishers primarily interested in shareholder profit, not dissemination of knowledge, is no longer in their own best interests. At its root, this lawsuit challenges what faculty members, who provide the content for scholarly publications, want to be able to do with their own work and the work of their colleagues — communicate it to students. If the copyright system determines that they cannot do that without paying yet more money on top of the exorbitant prices charged to buy the works back initially, perhaps there will be a general recognition that they should not freely give that content away in the first place. A return to first principles would remind faculty that these works belong to them unless and until they choose to give them away, and that they are free to negotiate the terms of any transfer of copyright. Ironically, this lawsuit's frontal attack on a core value in higher education may prove to be the best weapon yet to move scholarship off the increasingly dangerous and unstable copyright merry-go-round.

# Reducing the number of orphan works in the world

*Fri, 23 May 2008 10:52:57, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

The two orphan works bills currently under consideration in Congress share many common features, the most obvious one being that both address the problem of orphan works by drastically reducing the penalties for using such a work without permission. They also both would create a very burdensome process for determining that a work is sufficiently likely to be an orphan to justify the reduced penalties in the presumably rare case that the user was mistaken.

These bills have gotten mixed reactions from the library and copyright communities in higher education. The [American Library Association has indicated some level of support](#) for the Senate version of the bill, while [Public Knowledge](#) and the [Electronic Frontier Foundation](#) have both strongly endorsed the Congressional efforts. Several individual voices for which the academic library community has great respect, however, have indicated opposition. Kenneth Crews suggests his reservations, while also criticizing the campaign against the bills, in [this blog post](#), while Lawrence Lessig's opposition was expressed forcefully in [this New York Times Op-Ed](#).

My opinion is that the bills might do some good in a few situations, but they will not accomplish much. Part of the problem is that they are "remedy-based" solutions; they simply remove some of the risk attendant on using orphan works or, to look at it from the other perspective, the protection copyright owners have against infringement (Lessig puts the situation this way, but I am afraid that this formulation doesn't recognize that for most of the works we are talking about, there really is no rights owner whose protection would be decreased). But in any case, these bills would do nothing to curb the ever growing number of orphan works. So I want to examine some of the alternatives to a remedy-based solution to orphan works and consider changes in the law that might actually reduce the number of orphaned works that now burden our copyright system.

Lessig suggests one such strategy in his NYT piece when he argues that a more efficient and fair solution to orphan works would be to reestablish a renewal process and give new materials only a short initial term. Thus authors and artists who did not plan to commercialize their works after that short initial period (during which the vast majority of works exhaust their value) would allow those works to pass into the public domain. Those who did plan to continue to protect and exploit their works would pursue a very simple, inexpensive renewal. This would clear reduce the orphan works problem going forward, although it would not help with the many orphans already in our collections. The biggest objection to this plan, however, is that it reduces "formalities" into the enjoyment of copyright in contradiction to obligations the US agreed to when it adhered to the Berne Convention and the TRIPs agreement. Those international treaties do not permit formalities, which is a big reason we went to automatic protection in the first place. It is true that the US has been quite inconsistent in complying with the various obligations we took on with Berne and TRIPs, so this objection is probably not insurmountable. But it would be a major argument to be used against such a change, and it would probably prevent Congress from enacting a renewal requirement.

There are a number of other ways to imagine changes in the law that would reduce the problem of orphan works, either by focusing on the commercialization of particular works, as Lessig's suggestion



does, or by taking advantage of efficiencies gained by returning ownership of unexploited works to the original authors or creators. An upcoming post or two will examine some of those other possibilities.

# A copyright use case on film screenings

*Sat, 31 May 2008 15:05:33, ksmithl2@duke.edu, [category: notes]*

I have recently been answering several questions that seem to recur, in one form or another, quite frequently. As an extension to the copyright widgets that were well-received over the winter, therefore, I want to offer somewhat generic versions of these questions, along with my answers. I hope they will be useful to others, and even might spark discussions that will both improve my responses and benefit readers of this blog.

This first question was a version of the very common inquiry about when campus showings of films require either public performance rights or a license. The particular inquiry involved a group of films on a specific theme that were already owned by the University Libraries; the questioner, from one of our interdisciplinary centers, wondered rather generally about the legal requirements for show some of these films to groups.

The starting point is that a copyright owner has the exclusive right to authorize public performances of their works. For most films, the copyright owner will be the production company. A public performance is any performance given to a group other than the “normal circle of a family and its social acquaintances,” so almost all performances on campus (other than in a dorm room) are likely to be considered public.

There is one relevant exception to the general rule that the copyright owner has the sole right to allow or forbid public performances, and there are two general ways in which permission is obtained when that exception does not apply.

First, the exception is for performances “in the course face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.” This broad exception is what allows the screening of films in classrooms by course instructors all over most college campuses, but there are also many campus screenings to which it does not apply. The language of this exception does not limit the allowed performances only to credit-bearing courses scheduled by the registrar, so there is apparently some leeway here. If a regular student group that meets for a clearly educational purpose wants to view a film, for example, I think that performance is allowable under the exception and does not require permission, especially if there is a faculty advisor for the group or some other clear connection to the institution’s curriculum.

On the other hand, campus showings of a film solely for entertainment (such as college film societies) or to which a general invitation is extended so that people with no connection to a specific educational focus of the institution might attend seem outside the scope of the exception. These sorts of showings have traditionally been based on some form of permission.

One way in which permission is obtained is by renting a copy of the film from an agency that includes a license for public performance in the fee charged. Campus film societies often use such an agency; Swank (<http://www.swank.com/>) is one that is a common source for campus licenses.

In this case, since the university already has the films, the next question would be whether any of them were sold with public performance rights. Some films purchased by the library do have such rights and some filmmakers only sell their work that way; generally these films cost about 10x more than a film

without public performance rights, so price can tell us a lot about whether such rights were obtained (although it is not definitive).

Based on the general tone of the question, it sounds like the performances suggested would require permission, but since extensive detail about the intended audience for the films was not given, only the questioner ultimately will know enough to decide if these are public performances that fall outside the scope of the exception for face-to-face teaching activities.

# The timeless folly of DRM

*Fri, 06 Jun 2008 07:07:12, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management]*

There is a good deal of value in reading older works, even in a field that changes as rapidly as copyright. It is a fascinating exercise, for example, to read attempts in the late 1960's and early 1970's to influence the direction of the "new" copyright law being considered (which was passed in 1976). L. Ray Patterson's "[Copyright in Historical Perspective](#)" (Vanderbilt University Press, 1968), for example, or now-Justice Stephen Breyer's 1970 Harvard Law Review article on "The Uneasy Case for Copyright," offer an all-too-contemporary sounding warning about the doleful consequences of writing a copyright law that does not pay enough attention to users' rights or assumes that the concerns of industry as expressed at a particular moment should be enshrined in a statute meant to function for decades.

James Lardner's 1987 book about the development of video recording devices and the subsequent copyright consequences, "[Fast Forward: Hollywood, the Japanese and the Onslaught of the VCR](#)" (Norton) is another example of an older work from which there is still a lot to learn (my principle embarrassment in discussing the book lies in revealing yet again how often my own reading follows [suggestions made by Bill Patry](#)). As I read the book this weekend, I was struck especially by a small remark that, to me, reflected on a mistake the content industry cannot seem to stop making.

During the district court trial over the issue of whether Sony's Betamax device created liability for its maker due to copyright infringement, the trial judge, Warren Ferguson of the Central District of California, refused to allow the attorneys for Universal and Disney to put on a rebuttal witness who would argue that the court could reasonable force Sony to adopt a technological measure that would permit the non-infringing purposes Sony (with the help of Mr. Rogers, among others) had demonstrated for the VCR while preventing unauthorized recordings of broadcast TV. A "jamming device" was suggested that could, the witness would have asserted, be incorporated into all VCRs at a (relatively) minimal cost and would block recording of programs unless the broadcast chose to permit those recordings. Sounds a lot like the "broadcast flag" argument and the recent [flap over Microsoft Vista preventing the download of some NBC TV programs](#), doesn't it?

We are still wedded to the idea of technological solutions to the problem of unauthorized uses, and we have now gone so far overboard as to give legal protection to such technological systems, even when they have the intent and /or the effect of prevent perfectly legal uses or of reducing access to works no longer protected by copyright. And we continue to pursue a DRM "arms race" in which each new system is seen as a challenge in the user community and few last more than a couple of weeks before keys and hacks are discovered. The wisdom of Judge Ferguson's words in refusing to entertain this burdensome and unwise "solution" in Sony are, as yet, unheeded: "As sure as you or I are sitting in this courtroom today, some bright young entrepreneur, unconnected with Sony, is going to come up with a device to unjam the jam. And then we have a device to jam the unjamming of the jam, and we all end up like jelly." Now that this headlong plunge into chaos has been enshrined in section 1201 of the Copyright Act, Judge Ferguson (whose original decision in the case was [ultimately affirmed by the Supreme Court](#)) seems more and more like a prophet to whom we should have listened.

# Use case on NIH Public Access

*Tue, 10 Jun 2008 07:37:01, ksmithl2@duke.edu, [category: notes]*

Another question that is becoming common is about how to comply with the [National Institute of Health Public Access Policy](#). The answer presented here was to an inquiry about an article accepted for publication in the journal “Nature,” whose policy about compliance is fairly well-publicized and easy to find. The specific steps that an author must taken to be sure they have the rights necessary to authorized deposit (or to be sure the journal will deposit for them) will vary with each publisher; where there is uncertainty about the policy or negotiations required, the answer will be much longer than this one.

Dear Professor \_\_\_\_\_,

Congratulations on the paper! The first step in complying with the NIH public access policy is to be sure you retained the right to deposit the article when you signed a publication agreement. If you signed Nature’s usual author’s license, a copy of which is available here — [http://www.nature.com/nature/authors/submissions/final/authorlicense .pdf](http://www.nature.com/nature/authors/submissions/final/authorlicense.pdf) — there will not be any problem. That license allows the author(s) to retain copyright, although it gives Nature an exclusive right to publish, and it specifies that the author can place the article in a funder’s open access database subject to a six-month embargo.

Assuming that this is the license you signed, your next step is to actually deposit the article in PubMed Central. You do this using the NIHMS system; there are instructions and links here — [http://publicaccess.nih.gov/submit\\_process.htm](http://publicaccess.nih.gov/submit_process.htm). We are being told by those who have used it that the submission process is fairly easy and straightforward. Nevertheless, if you have any difficulties, just let me know and I or one of the librarians will be glad to come to your office and help you with it.

Once you have submitted the article, along with any supplemental material, all you have to do is wait. NIH will send you, or the principle investigator named on the appropriate grant if that is someone other than you, a final copy of the article as it will appear in PubMed Central for verification. It is important to review the article at that time to be sure everything is correct, just as you would do with the page proofs for the journal, and respond to that e-mail.

At some point in the process you will be asked to verify that you have the right to authorize PMC availability and to tell PMC about any embargo. As I said, if you signed the usual Nature license you do have the right to authorize availability and you should indicate a six month embargo. Even though you should submit your article immediately, it will not appear in the PMC database until six months after publication in Nature, in accordance with your license obligation.

For future reference in any paperwork submitted to the NIH, you will need to obtain the PMC ID number for your article. This helps NIH track compliance with the policy and is now required on renewal applications, progress reports and the like. Again, library staff can help you find this number if you have any difficulty.

# Imagining Fair Use

*Tue, 03 Jun 2008 13:43:04, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

A [recent decision](#) by a federal judge in New York is another example of the heavy preference for “transformative” uses in the fair use analysis. The case involves the use of a short clip from John Lennon’s famous song “Imagine” in the anti-evolution movie by Ben Stein called “Expelled.” The movie purports to be a protest against the lack of “intellectual diversity” in American schools; specifically that they do not represent the position known as “intelligent design” in science classes. The clip from “Imagine” is used to try, in a very heavy-handed way, to link science education to anti-religious bias, such as is allegedly found in Lennon’s song.

The judge has [rejected a request by the Yoko Ono for a preliminary injunction](#) that would prevent the distribution of the film. Ono claimed that the use of this short clip without her permission was copyright infringement. Given the vastly different political perspectives involved, it is unlikely permission would have been forthcoming. But the judge ruled that it was also unlikely that permission was necessary, since there was a strong claim that the use was fair use. Since one of the criteria for getting a preliminary injunction is “likelihood of success on the merits,” Ono’s request was denied because the judge felt it was unlikely she would succeed on the underlying claim that using the clip was infringement.

Transformative uses, which have recently been the subject of many, if not most, successful assertions of fair use, are those which create a non-competitive product or subject a copyrighted work to criticism, comment or parody. A parody, of course, does not compete in the same market for the original ([no one buys a 2Live Crew parody song as a substitute for buying the original by Roy Orbison](#)). Nor does the film *Expelled* compete in any way with the market for the recordings of John Lennon. And in a traditional transformative use case, the owner of the original may not have much desire to license the use if asked, since the proposed new use often subjects the original to criticism or ridicule (as in this case). Transformative uses are often those uses where there is a strong possibility that the copyright owner in the original work would use his or her rights to suppress the new speech; fair use is the remedy that prevents this censorship by copyright.

For me, this role of fair use in preserving copyright as the “engine of free expression” is especially clear in this case (for an explanation and discussion of this quote from [Harper & Row v. Nation Enterprises](#), see [this report from The Free Expression Project](#)). Free speech is always hardest to accept, and most important to remember, when one disagrees violently with what is being said. In this case, I personally have little use for the claims being made in the movie “Expelled;” they strike me as inflammatory and hard to defend with real logic or facts. Nevertheless, the right of the movie producers to make those claims is inviolate, in my opinion, and it is important that they have the tools to make their case in the best way they can. Fair use is an important tool to support creative expression, whether I agree with the content of that expression or not. The arguments being made in the movie may fail, but the judge got this decision exactly right when he ruled that the producers could use the tools they did (including a small part of another’s copyrighted expression) to make those arguments.

# Everything old is new again?

*Wed, 18 Jun 2008 07:11:03, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

Some intellectual property issues are hardy perennials; they bloom anew with great regularity. One such issue is the doctrine of first sale, which in other countries and other contexts is sometimes called the doctrine of exhaustion. However it is named, it refers to the nearly universal practice of holding that the “first sale” of a particular embodiment of intellectual property — a copy of a book or a CD — “exhausts” the exclusive right of the copyright holder to control further distribution of that embodiment. It is the right of first sale that allows used book stores, video rentals and lending libraries to flourish.

First sale has never been popular with the content industry; both licensing arrangements and DRM can be seen as modern attempts to exercise control over the downstream use and distribution of IP beyond what is allowed by copyright law. Back at the beginning of the 20<sup>th</sup> century, in fact, the Supreme Court had to deal with a case involving what I like to call the first “end user licensing agreement.” In [Bobbs Merrill Co. v. Straus](#) (1908), the Court found that an attempt by a publisher to mandate the retail price at which stores could sell the book “The Castaway” by Hallie Rives failed because of the doctrine we now call first sale. The publisher of this obscure novel inserted a “requirement” underneath the copyright notice that the retail price of the book must not be less than one dollar, and sued the store owned by Isidor Straus — Macy’s — when it sold copies for less.

In the past few weeks, two cases have been decided, one in the copyright arena and one dealing with patents, that again remind us of the continuing importance of first sale/exhaustion in a balanced system of IP protection.

In [Universal Music v. Augusto](#) the facts sounded strangely similar to Bobbs Merrill; a music company tried to distribute free promotional CDs of its music and prevent the resale of those CDs by simply placing a notice on the face of the disc. In granting summary judgment for the E-Bay vendor who resold some of these CDs, Judge Otero of the Central District of California noted that this kind of restraint on subsequent transfer had been rejected over 100 years ago. Also implicated and rejected in this decision is the attempt to create a license transaction merely by a one-sided statement that that was what was occurring. The court rightly found that the CDs were transferred to the recipients (by gift, in this case) and were therefore subject to the exhaustion of the distribution right.

The patent case, [Quanta Computer v. LG Electronics](#), also involved an attempt to control subsequent uses of a product embodying a patented process after the initial sale of that product. LG sued to collect a licensing fee from Quanta because Quanta used chips containing a process patented by LG, even though those chips were manufactured by an intermediary company (Intel) that had itself licensed the process from LG. In essence, LG wanted a cut on every downstream product that contained the already-authorized chips, but the Supreme Court said no: “The authorized sale of an article that substantially embodies a patent exhausts the patent holder’s rights and prevents the patent holder from invoking patent law to control postsale use of the article.”

As sturdy as these recurring issues are, however, we should not conclude that copyright law is ticking along without difficulty, adequately resolving conflicts in the 21<sup>st</sup> century with its arsenal of 20<sup>th</sup> century doctrines. The [current issue of “Cato Unbound,” on “the future of copyright,”](#) does a superb job of alerting us, if we didn’t already see it, that copyright law is struggling to keep up in the digital age. The [lead essay by Rasmus Fleischer](#), begins with the fascinating point that in the 21<sup>st</sup> century we have

moved to trying to regulate tools with our copyright law rather than content. In a digital age, he points out, many of the distinctions our law relies upon, like the difference between copying and distribution, no longer make any sense. As Fleischer says, “the distinction is ultimately artificial, since the same data transfer takes place in each.” This point undermines the comforting thought, expressed above, that first sale, for example, is still doing its job in copyright law, since the move to a digital environment makes application of an exception to the distribution right, but not the right of reproduction, highly problematic.

Fleischer’s article goes on to paint a fairly gloomy picture about a “copyright utopia” being advocated by the content industries, especially big entertainment companies, that could seriously undermine both technological innovation and civil liberties. He ends with the “urgent question regard[ing] what price we will have to pay for upholding the phantasm of universal copyright.”

In a [reply essay, “Two Paths for Copyright Law,” Timothy B Lee](#) suggests that things may not be as bleak as Fleischer suggests. He reminds us that it is only a very recent development that anyone has even considered question the legality of private, non-commercial copying for home use, and he opines that the effort to now assert control over such copying has already proved a failure. The alternative — the second path for copyright — is, as has been suggested before in this space, the development on new business models, which will largely be funded by advertising, to meet the non-commercial demand for content. The role of copyright law, in this scenario, is to protect content creators from unfair and unauthorized commercial exploitation of the works by competitors. It is commercial competition that copyright is intended to regulate, he suggests, not use by consumers. And he catalogs a wide variety of business models already being adopted by the major content industries, even as the pursue lawsuits against customers and strict laws from Congress, that seem to recognize the inevitable move towards a market solution, rather than a legal one, to the challenges posed by new technologies.

Some copyright doctrine remains unchanged over a hundred years, yet we have to adapt to rapid innovation even as we preserve what works in our law. The essays by Fleischer and Lee paint two different pictures of the future of copyright; the attraction of Lee’s vision, for me, is that it looks at what copyright has traditionally been designed to accomplish, the control of commercial competition, and offers hope that if we stay focused on that role for the law, the market will adjust to the technological innovations for users that currently frighten the content industries so.



# Bad strategy and poor reporting

*Sat, 21 Jun 2008 07:26:22, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: technologies]*

It is hardly surprising that the recent effort by the Associated Press to stop bloggers from quoting news articles, even when they link to the source on AP's own web site, has generated lots of comment in the blogging world. AP recently sent takedown notices, using the procedures outlined in the Digital Millennium Copyright Act, to try to have blog posts that quoted as little as 35 words of an AP story removed from the Internet. There has been enough coverage that it seems unnecessary to rehearse all the commentary; there is a [story at Ars Technica here](#), and [one from the Electronic Frontier Foundation here](#). Basically most of the coverage makes the same two, fairly obvious, points; this is a terrible strategy from a public relations point of view (as even AP now admits) and it represents an interpretation of fair use that would entirely eviscerate that vital exception if accepted by the courts.

What does deserve extended comment however, is one of the news stories that repeats a couple of common misconceptions that need to be dispelled. [This report on the E-Commerce Times site](#) offers the opportunity to clarify and correct two important errors about the DMCA and fair use.

First, the E-Commerce story quotes a source who refers repeatedly, and defiantly, to "this ruling." This is probably just careless language, but it also re-enforces the mistaken notion that receipt of a DMCA takedown notice means that infringement definitely has taken place. In fact, a rights-holder sends a takedown notice, using very specific provisions that the DMCA added to chapter 5 of the copyright act (17 U.S.C. 512), because they merely believe that their copyright is being infringed. There is no required quantum of evidence beyond a "good faith belief that use of the material... is not authorized," nor must a rights holder consider possible defenses to the claimed infringement. These provisions were never intended to substitute for a judicial determination on the question of infringement; they are intended, instead, to help the ISP avoid liability for any possible infringement by users of the service. The ISP does have to remove the material or block the user upon receipt of a take down notice, but they also must notify the user of the action and restore the material if the user sends a counter notice stating their own good faith belief that the removal was wrongful. Thus the notice and takedown process helps establish if there really is a conflict and gives the ISP a protected role when there is, but it leaves the resolution of the issue of infringement up to a court. The mere fact that the AP sent these initial notices is in no way any sort of "ruling" or definitive decision.

The second error in the E-Commerce story is its reference to "the fair use provisions of the Digital Millennium Copyright Act," which, we are told, the AP hopes to clarify. There is, of course, no fair use provision in the DMCA; fair use is much older than that piece of relatively recent legislation. Indeed, fair use is a doctrine initially created by judges in the early 19th century (in the US) to mitigate the harmful effects of the copyright monopoly. The DMCA, which took effect only in 2000, does not add anything to the fair use analysis, nor does it, in theory, narrow its scope; where fair use is mentioned in the DMCA it is only to emphasize that Congress did not intend the provisions of the DMCA, which attempt to deal with some of the new issues arising in a digital environment, to alter the applicability of fair use.

This last point is important, because it reminds us that we are not dealing with any new provision about what uses are acceptable in the digital realm. Instead, the same old provision about fair use (17 U.S.C. 107), which emphasizes the privileged status of news reporting and has traditionally been held to protect short quotations, would be applied in deciding whether or not these passages from AP news stories were used by bloggers in a manner authorized by law. The assertions by AP that these uses are

not fair use seem difficult to credit, but the point is that a court would have to decide the issue (if the AP decided to push that far; it is a much more costly and serious step than merely sending a takedown notice), and the standard used to make that decision would be the familiar four factors of fair use, just as they were outlined by Justice Story in 1841.

# Shaking the money tree

*Thu, 26 Jun 2008 09:01:08, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

In a [talk given at Cornell University last week](#), Steve Worona of EDUCAUSE said about business models for distributing intellectual property that “every few years the entertainment industry has to be dragged kicking and screaming to the money tree and have it shaken for them.” His point that the first reaction of entertainment company executives is to “tamp down” new technologies in order to protect out-dated business models is certainly borne out by recent history. Back in the 1980’s, of course, the industry fought hard against the growing use of home video recorders, both in the Supreme Court and in Congress, even as a new business model that would eventually make billions for the studios was being developed in spite of their opposition. No less an advocate for the old ways than Jack Valenti eventually realized that the movie industry lost that battle because they were perceived as anti-consumer. Nevertheless, the recording industry continues to make the same mistaken, even going so far as to sue they very consumers on whom it relies.

Are there alternatives? Worona’s talk is very persuasive in its discussion of why old models (based on counting copies) do not work for new technologies (which replicate bits) and how it is possible to develop new models that really can “compete with free.” I have [written about such models before](#), and also noted in a post last week [this article by Tim Lee](#) about an alternative path for copyright law that could support such new ways of profiting from intellectual property without crippling technological innovation. Some of those alternatives deserve further discussion. (and a lively discussion is continuing on the [Cato Unbound site](#)).

First, it is worth noting the [survey, reported by Ars Technica](#), that suggests that young people are willing to pay for music if it is offered on terms that seem reasonable to them. Although I can imagine the skepticism this will generate within the content industries, it at least suggests that innovations, rather than lawsuits, are worth a try; both may be risky, but the rewards will be greater from the latter.

Lee’s article briefly catalogs a variety of business models, in several different content industries, that rely on new ways to make a profit. One that caught my eye was the [Web service called Imeem](#), which combines a legal music downloading service with social networking opportunities. Revenue is generated through advertising, and the music is licensed using revenue-sharing agreements with the four major record labels. Users can create and share playlists and download music from those shared lists for free. As Lee says, “It is only a slight exaggeration to say the Imeem deal amounted to a de facto legalization of online file sharing, provided that the labels get a cut of any associated revenues.” Is this the future of the music business? I don’t know for sure, but I do know that I, as a music lover who has never obtained a music file from any online source other than iTunes, will now be looking on Imeem first; legal, ad-supported free music certainly works for me.

In his talk at Cornell, Worona suggested that, when a business learns that it will have to compete with free — with someone offering the same or substitutable product at no cost — the appropriate response is not to call the FBI, as the recording industry has done, but to call its own marketing departments. That is what Imeem has done, and they are giving the money tree yet another shake; let’s hope the music industry is paying attention this time.

# New tools for recording copyrights

*Wed, 09 Jul 2008 07:23:37, ksmith12@duke.edu, [category: notes, category: copyright-issues-and-legislation]*

Several new tools have recently become available to make copyright record keeping and searching somewhat easier, although it still is not what could be called simple. Perhaps more importantly, another set of “best practices” in fair use has been issued by The Center for Social Media at American University, which offers the opportunity to comment on what these statements of best practices are and what they hope to accomplish.

The first new tool worth noting is from the Copyright Office itself — a [new ingestion system that permits, for the first time, online registration of copyrights](#). It is hard to believe that this is the first time the Copyright Office has stepped away from paper forms, but that is the case. Starting July 1 it is possible to submit an online registration form and pay a fee that is \$10 lower than the standard \$45 cost of registration. The deposit requirement, which mandates that copies of a registered work be sent to the Library of Congress, will still have to be fulfilled by U.S. mail. It is also possible to track the status of a registration process that is done online. In addition to the online system, there is also a new paper form which uses barcodes to speed processing; the applicant fills out the form online, prints it off and mails it with the regular fee, but it does not take as long, in theory, for the Copyright Office to process. Since registration is still necessary before a copyright holder can file suit for infringement, a quicker registration system should help speed the judicial process a little. It will also make it easier to find copyright owners for works that are relatively new or newly registered.

Searching for copyright owners will become much more urgent if any version of the Orphan Works legislation pending before Congress actually is enacted, so copyright renewal records are as important, if not more important, than initial registrations. For new works, there is no doubt that copyright protection is in force unless there is some form of waiver like the [Creative Commons](#) license. But for those works most likely to be orphaned — works published between 1923 and 1963 — it will be vital to know if a copyright was renewed and, if so, by whom. Stanford University has offered a [database of copyright renewal records](#) for some time, and now there is a single XML file of both renewal records and original registration records from 1978 onwards [available from Google](#). The digitization of these records required the efforts of several dedicated organizations, including Carnegie Mellon’s Universal Library Project and the Project Gutenberg.

Once this XML file became available, it did not take long for some copyright geeks (no offense intended; I am one myself) to design a simple interface to search these records. [This site designed by a law student at Tulane University](#), under the direction of [Professor Elizabeth Townsend Gard](#), should make it much easier to examine the Copyright Office records, and they are promising a more sophisticated tool by Fall. Whether or not we actually get orphan works legislation, it remains very difficult to find rights holders for lots of different kinds of works, and we must be grateful to all of the folks who have created these tools to make that important task a little bit easier. All of the sites, however, come with the warning that it is never certain, based on a search of these records, that a copyright was NOT registered or renewed; while they will tell us who did file for registration or renewal, it will remain something of a risk to use a work for which one does not find a record in these databases. That is why orphan works legislation is needed, so that a user who makes the effort to search these records and cannot, in good faith, find a rights holder is subjected to a much lesser risk than one who uses a work without any attempt to find out if copyright persists and by whom it is held.

See tomorrow's post for discussion of a different kind of new tool — a statement of best practices for fair use in online video.

# What can best practices do for us?

*Fri, 11 Jul 2008 13:57:56, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: fair-use]*

As promised, I want to look at a different kind of “new tool” to help users of copyright-protected content figure out what they can and cannot do as they work on new creations.

Best practices are a relatively new phenomenon in the copyright environment. The Center for Social Media at American University, a joint project of School of Communications and the Washington College of Law, has really lead the way in creating statements of best practices around fair use in video production. The first one, produced in cooperation with several documentary film groups, is a [Documentary Filmmakers’ Statement on Best Practices in Fair Use](#). That statement has proved very successful in gaining recognition both amongst filmmakers and from the ancillary organizations like the insurance companies that support and underwrite documentary film projects.

Next there was a report on user-generated video called [Recut, Reframe, Recycle](#) that spelled out six creative practices that, the report’s authors felt, were potentially legal but were in danger of being curtailed by the draconian measures being sought by many in the content industry to combat online sharing of video and music files. Even though creative remixing is a very different activity, both legally and in its value to society as a whole, much of the “anti-piracy” rhetoric seems unable to make even the grossest distinctions. Thus the stakeholders in that conversation felt the need to articulate another set of best practices, released last week.

The [Code of Best Practices in Fair Use for Online Video](#) is intend to provide support for the activities of filmmakers who create works like “[Dramatic Chipmunk](#),” which is used to illustrate the report’s cover. Such works are new creations built from the building blocks of other people’s work. This, of course, was the original purpose for the “copyright bargain” Congress was empowered to make by the Constitution (although the Framers probably did not foresee some of the results of that bargain!). This new code of best practices describes itself this way: “This is a guide to current acceptable practices, drawing on the actual activities of creators, as discussed among other places in the study Recut, Reframe, Recycle: Quoting Copyrighted Material in User-Generated Video and backed by the judgment of a national panel of experts. It also draws, by way of analogy, upon the professional judgment and experience of documentary filmmakers, whose own code of best practices has been recognized throughout the film and television businesses.”

For me, an immediate question is how these statements of best practices differ from the various attempts to articulate guidelines to define fair use, attempts that have caused great anxiety and a notable “chilling effect” on fair use despite the best intentions of those who promulgated them. The quickest answer is that best practices are usually generated from within an industry or an industry segment, whereas guidelines have traditionally been negotiated between users and rights-holders. “Best practices” are not an attempt to define a “safe-harbor” that will necessarily protect one from lawsuit, especially since many such attempts have proved illusory in the past. Rather, their aim is to accurately describe a consensus with a particular user group about what is and is not acceptable. Such a consensus can serve a couple of purposes.

First, it can help prevent the kind of “self-censorship,” or chilling effect, that is all too familiar among users; the decision by a filmmaker to forgo the best shoot or abandon good footage because a copyrighted work was accidentally captured in some of the frames, for example. Best practices can

provide reassurance to that filmmaker that what she hopes to do is well within the standard practice through her industry.

Second, best practices could provide courts with exactly the kind of “industry standard” that is useful in determining when to find infringement or to protect a particular use as fair use. These documents can provide courts with a synoptic view of what kinds of practices are necessary for professional filmmakers and amateur videographers alike to create new works. By spelling out what kinds of practice are needed, as far as fair use is concerned, for creativity to flourish, statements of best practice can show courts that the particular industry is acting in good faith and can provide a broader perspective on the specific issue that has come before that court.

Best practices will not solve all the problems in the highly contested world of copyright and user rights, but they can serve a useful purpose. It is important to distinguish that purpose from the more grandiose and unrealistic claims made for copyright guidelines. Best practices may not stave off lawsuits, but they can help courts judge those lawsuits fairly and they can help users avoid letting the fear of a lawsuit overwhelm their urge to create.

Note — after completing the above post I discovered this [contribution to a debate about best practices](#), which I now call to the attention of interested readers.

# Making Elsevier look good

Wed, 16 Jul 2008 09:26:54, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]

For many years, Dutch publishing giant Elsevier has been a kind of *bête noir* for academic librarians, serving as principal whipping-post for the exorbitant price increases that have been strangling off the scholarly communications system for over 20 years. But the ground has shifted somewhat, and we have recently observed some academic press and scholarly societies — agencies whose mission is, putatively, to serve research and scholarship — adopt policies that make Elsevier look almost scholar-friendly.

We have recently witnessed the unseemly spectacle of two at least nominally university-related presses suing a university to try to narrow the scope of fair use for academics, calling out by name some of the very authors upon whom they depend for the content that fills the pages of their publications. Now another organization that is supposed to represent scholars, the [American Psychological Association](#), has turned to bite the hand that feeds it.

First there were the threats to sue a major American university library for allegedly using too many examples from the “APA Manual of Style” in the teaching materials it creates to help students learn how to use that citation format. Since continued sales of the Manual depend on students being trained to use it and faculty assigning it, and since there are other nearly identical and completely substitutable style formats available, it is hard to see what these threats could hope to accomplish. Shutting down one’s principal market is a radical and unproductive way to protect one’s copyright.

Now comes the [news](#) that the APA is [announcing that authors publishing articles in its journals](#) that are based on NIH-funded research “should NOT” deposit their own works in PubMed Central as is now required by law. Rather, they will be required to pay APA \$2500 so that the articles can be deposited by the publisher. Since there is virtually no cost associated with the mechanics of deposit itself, and the NIH policy allows an embargo on public availability of articles of up to one year in order to protect the traditional subscription market, it is hard to see what this policy is intended to accomplish other than to force an additional income stream out of the faculty authors who already provide the APA with free content. And there is heavy irony in the APA’s assertion that they can do this “as the copyright holder.”

APA is trying to put its own authors between the proverbial rock and a hard place, and it is behaving as if theirs is a non-competitive market. This is not, in fact, the case — only two of the top ten psychology journals in 2007, based on impact factor, were published by the APA, and one non-APA journal editor expressed pleased surprise at the new policy because it was sure to benefit those other journals. But for years our faculties have behaved as if they were, indeed, captive to specific journals. As scholarly societies are driven, apparently by fear and anger more than a realistic business strategy, to treat the authors on whom they depend with such contempt, one can only hope that this misperception will begin to change.

Two simple and specific messages need to be delivered over and over to our faculty authors if this dysfunctional and abusive system is to change.

First, they need to be reminded that they do have choices about where they publish their work; there is no logic in remaining loyal to a particular journal when the publisher of that title has clearly decide to place profit and self-interest above the well-being of the academy, the discipline, or its scholarly authors.



Second, regardless of where they publish their research, scholars should resist transferring copyright to journal publishers. APA can only tell scholarly authors what that can and cannot do with their work after they have received a transfer of copyright; up to that point they must negotiate, not dictate. Academic presses can only sue universities over e-reserves because they have been given the copyright in those scholarly works in the first place. To cut the Gordian knot that is plaguing our scholarly communications system, we need to make an exclusive right to publish for a limited time (with reservation of some negotiable authors' rights within that period) the standard for scholarly publishing agreements. As the original owners of copyright, forcing that change is within the power of faculty authors.

NOTE — Half an hour after this post was published, the APA web page referenced above no longer carries the policy announcement and says simply that the page is under review. We shall have to wait and see what APA comes up with, but the two cardinal points mentioned herein remain valid and urgent.

# Where should we spend our money?

*Mon, 21 Jul 2008 08:57:08, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The attention paid in the last few weeks to the cost of textbooks and the promise, as well as the risk, of moving to e-texts has prompted me to consider the above question.

Some of the recent reportage has focused on e-textbooks as a way to reduce the costs students must pay for course materials; [this article in USA Today](#) is an example of this kind of story. There have also been several comments from open access advocates supporting the move toward open online textbooks; see [this post](#) by Georgia Harper and [this one](#) from Peter Suber.

There has also been some commentary recently on the abuse of new models of textbook distribution. The Boston Globe ran [this article on “Textbooks, free and illegal, online”](#) just a few days ago. It is unfortunate, but hardly surprising, that it is only in this article about “pirated” textbooks that the Association of American Publishers is quoted; they could do so much more if they were actively involved in a positive solution that could reduce textbook costs and improve access. But it is the faculty who write the textbooks who are quoted as seeking a legal solution, while the publishers merely resort to heavy-handed enforcement measures for a law that is rapidly becoming unenforceable in a technological environment for which it was never designed. The fuss usually works in individual cases — the Chronicle of Higher Education [reports today](#) that the specific site discussed is off-line — but it is ineffective to stem the digital tide.

But faculty do not come out unscathed in this discussion either, as is clear from [this post about the practice of professors commissioning “custom” textbooks](#) and receiving “royalties,” which William McGeveran of the University of Minnesota Law School calls “kickbacks,” from the required purchases by their students.

The lesson here seems to be that the digital environment is inevitably going to change the environment for textbooks as it has for most other kinds of intellectual property, for good or for ill. Georgia seems to feel that the publishers will eventually figure the market out and move to new profit models while supporting open access. But I think there is also an opportunity here for institutions to be more proactive and seek ways to invest in open access textbooks on a campus-wide level.

Why should schools consider doing this. First, with all the pressure that institutions of higher education are under to reduce the costs for students to attend, open access textbooks offers an avenue for proactive investment that will simultaneously reduce student costs and encourage faculty scholarship. Second, this is a place where universities actually can help combat copyright infringement. Universities have been made the scapegoats in the file-sharing wars, but there is really not a lot they can do to ameliorate that problem, especially since the vast majority of music and movie file-sharing does not occur over college and university networks. But by supporting open access to e-textbooks, we really can reduce the problem of infringement in that realm.

How can universities invest their funds in ways that will encourage open access textbooks and reduce costs (and therefore the incentive to infringe copyright) for students? I can think of three ways, off hand.

First, institutions could invest in infrastructure that would encourage new models for electronic course content. This means a great deal more than simply providing the storage space necessary for an

institutional repository. Universities also need to support their faculty authors in efforts to retain copyright so that they can deposit their works in an IR and create new and unanticipated derivative works from those publications. The opportunity to combine materials located in an institutional repository in new ways would create a different spin on the custom textbook; it would offer a heretofore unimagined flexibility based on legal rights retained by the authors of the component parts and licensed to institutions or, using a Creative Commons license, to a broader group of users.

Second, universities and consortia could bring their purchasing power to bear to negotiate multi-user licenses for existing e-textbooks or new ones created in the commercial market. The current models all rely on students to each pay individually a licensing fee (putatively lower than the purchase cost of a hard copy) to obtain access, for a limited time, to an e-text. Multi-user site licenses could further reduce the price per user and give the university flexibility about whether to assess each student user for that lower cost or simply cite the funding to legislators as an investment in reducing student costs.

Finally, universities could make funds available for faculty to encourage the development of open access texts. There has been a great deal of talk recently about funding to support open access via “hybrid” publishing — traditional publications onto which an open access alternative is grafted if the author, or her institution, is willing to pay an added fee. It seems to me that a much wiser investment, and one with a greater return for the dollars spent, could be made by turning those funds to support faculty who want to create online open access textbooks that can be used by students on their own campuses and by others who teach similar courses. Adaptation by others, in that case, would provide an effective “peer-review” to measure the quality of the faculty author’s contribution. In this way, student costs could be reduced, faculty scholarship supported, and the real potential of the digital environment for collaborative learning more fully exploited.

# Irrational publishing and recursive publics

Thu, 31 Jul 2008 13:02:19, ksmithl2@duke.edu, [category: scholarly-publishing, category: technologies]

A courtesy “heads up” from Ellen Duranceau, a scholarly communications colleague at MIT, alerted me to this [podcast about scholarly communications with Dan Ariely](#), the author of the fascinating and best-selling book “[Predictably Irrational](#).” This 20 minute interview is well worth the time for both librarians and scholarly authors who are concerned about the current state of scholarly publishing and interested in its future. I am looking forward to listening to the other interviews that MIT makes available.

Ariely was a Professor of Behavioral Economics at MIT, which is why Ellen is interviewing him, and he recently moved to a [similar position here at Duke](#), which is why she alerted me to the podcast. Ellen deserves great credit for the insight — “I wish I had thought of that” — that Ariely would be a really interesting person to ask about the state of scholarly publishing. Not only because he has recently made the successful transition from obscure academic author to public intellectual, which he discusses in the interview, but because the theories and experiments that have made his work so well-known themselves suggest important insights into the scholarly communications system.

Much of Ariely’s work focuses on the odd things that happen when economic and social norms collide and intermingle, which is exactly what happens in the system of scholarly publishing. Faculty authors are largely driven by social norms and reward structures that are quite different from, and increasingly at odds with, the economic incentives that drive publishers. The result is a strange and dysfunctional system.

During the interview, Ariely refers to his “back of the envelope” calculation that it costs a university over \$50,000 to support the production of a single scholarly article, which indicates how badly askew the economics of publishing are, when universities not only subsidize production to that extent but also repurchase that subsidized content after publication. It is precisely because the academy is governed by an entirely different set of social norms that we have allowed the economic situation to get so far out of hand. But Ariely’s endorsement of a more open and accessible system of scholarly communications is not itself, finally, based on these economic conditions. Rather, he has discovered, through his own experiences with the public attention he has received, the great benefit both to the individual scholars and to society, of open and interactive scholarship. The ultimate take-away from this interview for me was that scholarship itself can be improved by reaching out to larger publics and incorporating those publics into the work of research and writing.

As a sort of “proof of concept” of Ariely’s claim, I was interested in the experiment in a new kind of “hybrid” publishing going on with a recent book by Rice University professor Chris Kelty. “Two Bits: the Cultural Significance of Free Software” is published by Duke University Press (you can [buy a copy here](#)), but is also [available online on this author-maintained website, twobits.net](#). One can read the book online, comment on its various chapters, and “[modulate](#)” with it — use it in small chunks to create new scholarship. Kelty uses the concepts of re-mix and [recursive publics](#) to experiment with what we really mean when we say that scholarship builds on the works of others. This experiment with modulations will be the most interesting part of Kelty’s new model of scholarship to follow, but in light of what is discussed in the Ariely interview, I think there are two more basic questions to ask about this kind of hybrid model for scholarly publishing. First, will online availability depress sales of the print book, or will people who come to it first online be motivated to buy a hard copy (as I was)? Second, will the experiment in public comment and reuse really result in improvements to the text and to scholarly output that builds creatively upon it? This latter question is a way of asking if the results that Dan Ariely

reports in his interview can really be replicated for scholars who do not attract the same level of celebrity.

# Insights from across the pond

*Mon, 04 Aug 2008 14:47:32, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

One aspect of the international treaties on copyright to which the US is a party has been getting quite a bit of attention recently. The “three-step test” is a provision in the Berne Convention and in the TRIPs (Trade Related aspects of Intellectual Property) Agreement that broadly defines the role of limitations and exceptions in copyright law. It is possible to read the three-step test as providing only a very small window for limitations on and exceptions to the exclusive rights granted by copyright, and “Big Content” has been very active in promoting that interpretation. Recently a [legal opinion letter](#) was submitted to the National Institute of Health trying to argue that the NIH Public Access Policy, for example, violated the three-step test.

[Applying the three-step test to something like the NIH policy is absurd](#), but the argument is made for its value as a scare-tactic. Politicians and bureaucrats are very sensitive these days to international aspects of intellectual property, so the three-step test is a very handy club with which to pound into legislative heads one’s own economic interests. So it is very refreshing to read the new Declaration by a group of European IP scholars from the [Max Plank Institute on Intellectual Property, Competition and Tax Law](#) on [“A Balanced Interpretation of the “Three-Step Test” in Copyright Law.”](#) The authors of the declaration argue convincingly that the test should be understood as a comprehensive framework for interpreting limitations and exceptions, rather than as a set of three steep hurdles over which any proposed exception must leap. They emphasize that the interests of third parties, as well as domestic decisions about the best way to restrict IP monopolies, are not incompatible with the international three-step test.

Beyond its main point, however, I was struck by a simple distinction that is made within the declaration that, to me, has implications well beyond the debate over limitations and exceptions. The authors remind us that the implications of any proposed limitation or exception for both “original rightsholders” and “subsequent rightsholders” should be considered. This simple recognition that the interests of “authors,” who are the original holders of copyright, are often not identical to or necessarily compatible with the interests of those to whom those rights are traditionally transferred is profoundly true in the area of scholarly publishing. As I have stressed many times, scholarly authors are usually rewarded almost exclusively by reputation and by reward structures internal to their institutions. Thus their interest is usually in the widest possible distribution of their work. The “subsequent rightsholders” of scholarly work, however, are interested in profits, and their interests may prevent the wide distribution that would best serve scholarship.

To my simple mind, this distinction carries enormous power. Throughout history, all the way back to the [18<sup>th</sup> century “battle of the booksellers,”](#) publishers and other distributors have appealed to the image of the poor, starving writer to demand stronger copyright protection. But the interests of the two groups are seldom the same and often conflict. Another recent document on international copyright, the [“Green Paper on Copyright in the Knowledge Economy,”](#) issued by the European Commission a couple of weeks ago, reinforces this point. In considering the very strong protections contained in a recent EU Directive on the Harmonization of Copyright, the EC report notes that there have been persistent questions raised about whether these broad exclusive rights actually translate into an advantage for authors of the works, who are, of course, supposed to be the principle beneficiaries of copyright protection. Performers, composers, film directors and journalists all complain, according to the report, that they are not making any extra revenue (no increased incentive) because of those new, stronger

protections; all of the benefit is directed to the big distribution conglomerates that take copyright from creators and exploit it for their own benefit. This is the dilemma of scholarly authors on a larger scale, and we should watch the debates taking place in Europe for insights into why it is such a bad idea for scholarly authors to transfer copyright to publishers who do not have the best interests of either scholars or scholarship at heart.

# And advice from up north

*Wed, 06 Aug 2008 14:14:37, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation]*

When I first heard that the [Canadian Association of University Teachers](#) had approved an [intellectual property advisory for faculty authors encouraging them to retain copyright](#) in their published academic articles (hat tip to [Heather Morrison](#)), I was delighted and planned to post an enthusiastic plug for the short document in this space. I still am excited by the decision of CAUT, but another recent event has provided a sense of context that I think helps show how urgent the advice given by this Canadian counterpart of the Association of American University Professors is.

William Patry is a well-known copyright practitioner and scholar; it is hard to imagine a more distinguished resume for someone wanting to comment on copyright law today. His copyright blog has been a valuable source for me, often cited here, of interesting information and thoughtful reflection. So I owe Bill a lot of gratitude for the work he has done over the past four years, and am deeply saddened by his [decision to give up his blog](#).

Patry gives two reasons for the decision to stop sharing his learning and insight in this format. First, he is finding that it is increasingly difficult to get others to understand that his blog is an expression of personal opinions and not those of his current employer. Second, he says that the state of copyright law has simply made it too depressing to constantly be the bearer of bad news. As he eloquently expresses the current state of things,

Copyright law has abandoned its reason for being: to encourage learning and the creation of new works. Instead, its principal functions now are to preserve existing failed business models, to suppress new business models and technologies, and to obtain, if possible, enormous windfall profits.

This analysis seems discouragingly correct to me, but it also reminds me that, in the small corner of the copyright world that is scholarship, there is something we can do to alleviate this problem. And the Canadian Association of University Teachers have clearly told us what that something is — retain copyright.

In its intellectual property advisory CAUT expresses concisely both the problem:

Without copyright ownership, academic staff can lose control of their own work and may no longer be entitled to email it to students and colleagues, post it on a personal or course web page, place it in an institutional repository, publish it in an open access journal or include it in a subsequent compilation.

and the solution:

Journals require only your permission to publish an article, not a wholesale transfer of the full copyright interest. To promote scholarly communication, autonomy, integrity and academic freedom, and education and research activities more generally, it is important for academic staff to retain copyright in their journal articles.

CAUT offers us a way out of the increasingly suffocating dilemma regarding copyright in which academia finds itself. We must hope that US educational groups and institutions of higher education will follow



suit, and that individual faculty will continue to assert their rights as the original copyright holders in their scholarly writings.

In the meanwhile, a heartfelt thank you to Bill Patry for sharing his wisdom with us.

# More on e-textbooks

Sat, 09 Aug 2008 06:48:53, ksmith12@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies]

A few weeks ago I did a [post](#) suggesting that universities should look at digital textbooks, both licensed and open access, as a way to help students reduce the cost of higher education. The reauthorization of the Higher Education act, with several provisions related to monitoring of costs, reminds us that lots of eyes are watching that topic.

A couple of recent news items suggest the richness of the opportunities, both for education and for innovative business models, that online textbooks can offer.

First there is this [interview with Eric Frank, a founder of Flat World Knowledge](#), about that company's venture into creating textbooks that will be freely available online and also can be purchased through a print-on-demand service and even as an MP3. Frank explains very clearly the imbalances of the current system for publishing textbooks, where high prices drive a thriving used book market that undermines sales and drives prices even higher and where new editions are created not because of changes in the field of study but in order to renew revenues lost to used book sales or piracy. More importantly, Frank describes in considerable detail the alternative business model that Flat World is pursuing, which combines a more consistent revenue stream with free availability for those who want only online access and many flexibility features for both the original author and other instructors to change and adapt the books for specific pedagogical needs. Flat World has at least 15 schools on board to experiment with its new model for textbook delivery; it is a beta test that should be carefully watched — whether or not it succeeds, it will provide valuable lessons about how we might harness the educational potential of online publishing and break the strangle hold of out-dated business models.

On a more whimsical note there is this [brief article from the ABA Journal](#) about a law professor who wants to create an animated “case book” for tort law. [Professor James Cooper from California Western](#) is proposing that animated videos of some of the most important cases in tort law be available on YouTube for students to study. This is obviously not just an impractical whim; Prof. Cooper has produced numerous short videos on legal topics ([available here](#)), including a public services announcement on DVD piracy called IP PSA (in Spanish).

My first thought about this was that the famous case in which NY Court of Appeals Judge (later Supreme Court Justice) Benjamin Cardozo decided that tort liability did not exist when the harm caused was unforeseeable would make a great video. That case, *Palsgraf v. the Long Island Railroad Company*, has great dramatic elements — a moving train, an exploding package of fireworks and a huge set of scales yards away falling on an innocent bystander. It is a set of facts that a first-year student is unlikely to forget, if they read the case in the first place. Unfortunately, the pressures of law school and the arcane nature of some of the opinions leads many students not to bother. The animated gallery of cases that Prof. Cooper suggests cannot replace traditional law school methods, but it could provide a helpful supplement. And since federal judicial opinions are almost always available on the open web, it is at least possible that a combination of this YouTube gallery with some sophisticated linking and added commentary could replace a casebook with an alternative both more economical and more likely to get students' attention.

[The “Law Librarian Blog” asks](#) if this idea is innovative or insulting. From my point of view (as a relatively recent law school graduate), it is both innovative and representative of the kind of experimentation that

needs to be taking place. Animation may not be the future direction of law school instruction, but all such experiments will help us arrive at a clearer vision of what that future can be, and they help us break the grip of traditional notions that are no longer working.

# A “twitter” about contracts

*Fri, 13 Jun 2008 07:54:39, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

Although I had heard of [Twitter](#) for a while now, I did not really know what it was until prompted to learn more by two recent articles. One is [this piece in the Chronicle](#) of Higher Education about potential library uses for the “microblogging” or social messaging service. It recalls the discussions I heard recently about the different level of involvement [folks from my institution felt at an academic conference](#) when the audience for various talks was using Twitter during the programs to share comments, examples and the like. Rather than being distracting, as I suspected it would be, the reports were that this added a welcome dimension to the conference experience.

What caught my professional attention, however, was this [report of an ongoing controversy](#) between Twitter and some of its customers about the [terms of service](#) to which every user agrees when they sign up for the service. The specific argument concerns the degree to which Twitter was obligated to pursue complaints of harassment directed against another user. On that issue, Twitter seems to be caught between a rock and a hard place — if they do not take steps to stop harassment they seem to condone a clear violation of a condition of use that they imposed, but if they do take action they may put in jeopardy the “safe harbor” protection from liability based on user postings that they gain under section 230 of the Communications Decency Act.

The broader issue, in my opinion, is the role of these terms of use statements in governing the relationship between users and the providers of Internet services. For one thing, it seems that such contractual agreements can be changed at the will of the provider. As the article cited above tells it, rather than address the harassment issue, Twitter indicated that it would wash its hands of the issues and simply “update” its terms of service. More amazing yet is the statement that Twitter borrowed its TOS from Flickr, apparently without much attention to what they contained. A Twitter executive is quoted as saying that, as a start-up, Twitter just “threw something up early on and didn’t give it a lot of thought.”

Who knew that these Internet companies had such a cavalier attitude to the non-negotiable contracts they are imposing on Internet users? Actually, the terms Twitter uses, and says they borrowed from Flickr, are much less lengthy and burdensome than those now used by Flickr itself; since acquisition by Yahoo! the terms of use that a new Flickr user agrees to (standard Yahoo! terms) prints out to seven type-filled pages, where the Twitter TOS amounts to only two pages. These click-through terms are being enforced by courts as binding contracts, even when the Internet service provider doesn’t “give them a lot of thought.” In the [case about the plagiarism detection site Turnitin](#), high-school student users were held to the terms of service they clicked through even though they made valiant efforts to modify those terms.

As more and more communication on campus happens over these kinds of proprietary sites and networks, and as commercial Internet tools become more common for student and faculty worker, these contracts will increasingly control what we can do. Often they give the owner of the site or tools an exploitable interest in the work created or stored there. Yet very few people even realize that they are binding themselves to detailed and enforceable terms whenever they click “I agree.” It is therefore becoming ever more important that courts find ways to introduce some nuance into their enforcement of these click — through agreements, rather than simply enforcing them blindly as the Virginia court did in Turnitin. At least one proposal for such a nuanced approach, that considers when a contract,

especially a non-negotiable online contract, should be preempted by federal copyright law and the policy that law is aimed at enacting, is found in this complex but compelling article on "[Copyright Preemption of Contracts](#)" by Christina Bohannon. We can but hope that courts will develop a more sophisticated approach to these contracts, whether they use Bohannon's proposed approach or some other, as they become more aware that such contracts may undermine both the policy behind copyright law and the traditional rules of contract formation, and they may do so, if left unchecked, based on very little thought or reflection by the party that is imposing the terms.

# How “real” is intellectual property?

*Thu, 03 Jul 2008 13:16:20, ksmithl2@duke.edu, [category: notes, category: copyright-issues-and-legislation]*

Toward the end of a session on copyright at the American Library Association’s annual conference last week, Carrie Russell, who is the Director of the [ALA’s Program on Public Access to Information](#), exhorted the audience never to speak about copyright “ownership.” “Rights holders,” she said, do not own anything at all; holding IP rights is not the same as owning “real” property.

Based on the common understanding of ownership, it is easy to see what Carrie is getting at here, and to agree with it. There are fundamental differences between real property and intangible intellectual property. The most obvious is that borrowing or sharing intellectual property does not diminish the supply of it. And a rights holder loses his or her rights after a set period of time, the period set by the statutory grant of those rights. This makes it very clear that intellectual property rights are indeed a creature of law, created by legislative action and not by natural right.

But in truth, all property ownership, at least in the 500-year-old Anglo-American tradition, is similarly limited. It is a truism of property courses in law school that owning a piece of land means holding a bundle of rights, most importantly the right to exclude others from the property. But once real property ownership (as well as ownership of “chattel”) is seen as a bundle of rights (just as copyright is), the distinction between real and intellectual property seems less clear and telling. In a [recent blog post about the Israeli copyright scholar Orit Fischman Afori](#), William Patry has occasion to quote the British philosopher Jeremy Bentham on this topic: “there is no such thing as natural property; it is entirely a creature of the law. ... Property and law were born together, and would die together. Before the laws property did not exist; take away the laws, and property will be no more.” If real property is subject to the same limitations as intellectual property — each is a limited set of rights granted by statute rather than a permanent and uncompromisable outgrowth of natural law — it is interesting to ask what the real consequences of the analogy between owning IP and owning a car or a piece of land might be.

This analogy, of course, is a favorite of copyright “maximalists” who frequently complain, for example, that car thieves get thrown in jail while “pirates” of copyrighted music must be sued individually and at great cost to the rights holder. Many would like to view ownership of IP as a kind of “allodial,” or absolute, ownership, and would be surprised to learn that no ownership under our system of law derived from feudalism is actually so absolute. All ownership is subject to limitations imposed by law to achieve a fair balance between exclusive possession and socially beneficial use. If maximalists got their way and IP ownership was really treated just like owning real estate, they might regret what they wished for.

Real property ownership is, after all, subject to lots of limitations. Zoning laws, for example, place strict limits on the use of particular parcels of land; I cannot open a law office in my garage in the neighborhood in which I live because it is zoned for residential use only. Not really very different from all those restrictions on the exercise of copyright found in sections 107-122 of Title 17. And in the world of both real and personal property, the “doctrine of first sale” is virtually absolute; the law looks very suspiciously on any attempt to restrict the “free alienability” of land and often will not enforce such restrictions. IP owners who have recently [tried to attack first sale in several court cases](#) would not benefit much if the analogy with real property were strictly applied. Finally, property rights in the bundle that land owners get can be lost if they are not exercised. If I occupy a piece of land for a set period of time — 15 years in many states — and the owner makes no attempt to eject me, I will become the new

owner of that land. Imagine how our [orphan works problem would diminish if we applied that same principle to copyrights](#). On this score, copyright owners, whose rights persist for life plus 70 years whether they exercise them or not, are much better off than are those who own land. A copyright holder can choose to exercise their exclusive rights in one case, then ignore other infringements for many years before electing to enforce their rights again; a landowner does not have that luxury.

The relationship between real property ownership and the same concept regarding intellectual property is complex, but both are bundles of rights that are subject to many limitations and exceptions in statute and in common law. Neither copyright maximalists nor those who advocate for more limited IP rights have the argument all their own way when the analogy with land is invoked, but especially for the copyright owner who asserts that his or her rights should be treated just the way real property ownership is treated the message is “be careful what you wish for.”

# Copyright reform — what would “green” copyright look like?

*Fri, 25 Jul 2008 18:51:16, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

My wife frequently accuses me of finding copyright and other intellectual property issues everywhere, often where no “normal” person would perceive such a question. So I was both surprised and vindicated to see discussions of “green” copyright in a couple of places recently; surprised because even with all my obsessing about copyright, I had never considered how one might make a more eco-friendly copyright



law.

The most comprehensive discussion I have read so far about green issues for copyright reform comes from [Michael Geist](#), the Canadian copyright scholar who is leading a powerful grass-roots opposition to the new proposed copyright law in Canada — [Bill C-61](#), introduced in Parliament several months ago. In a [column for the Toronto Star](#), and again on his fascinating [blog site](#), Geist lists several problems with the proposed law that could hamper efforts to improve the environment (or at least slow the harm we are doing to it). Since a major complaint about the Canadian proposal is that it looks too much like US copyright law, it is fair to assume that these “Canadian” issues are US issues as well:

1. Copyright law can impact our ability to recycle computers and other electronic devices in order to reduce the amount of “techno-waste” that is generated each year. Protections for software in general and especially prohibitions that prevent circumvention of digital protection measures can prevent new users from gaining access to recycled devices. It is no secret that Apple want to sell each of us a new iPhone every year or so, but there is potential environmental impact to legal enforcement of that business policy. Geist refers to a US case where the potential for this kind of ecological harm was very real — [Lexmark v. Static Control Components](#), in which Lexmark tried to use the DMCA anti-circumvention rules to prevent a competitor from making chips that would allow the re-filling of laser printer ink cartridges. The courts found that such an application of US copyright law would be anti-competitive, but it is worth noting that a contrary decision might also have been anti-environmental.
2. Protections that restrict copying of software and storage of copyrighted materials on shared networks can inhibit the efficiencies gained through “[cloud computing](#).” If memory-intensive research — crunching huge data sets for example — can be done by a network of computers rather than at a single site, unused capacity can be exploited to reduce the need for multiple



institutions to obtain massive computing capacity that may be used infrequently. Copyright law can have a lot to say about whether such shared projects will be feasible.

3. A similar issue is raised regarding the possibility of consumer storage of memory-intensive materials in networked systems. In the US there already exist network-based video recording services that decrease the proliferation of digital devices that increase energy usage and eventually end up in landfills. US courts have not been consistent in their approach to these services, in part because our copyright law does not directly address the status of copies made solely for personal use. The new Canadian proposal would take up that issue and would authorize only a single copy of consumer-purchased songs or videos. With such a law, not only would consumer choices be severely restricted, the need for many individually owned storage devices would burgeon — good for the consumer electronics industry but bad for the environment.

In addition to these copyright issues that could have significant ecological impact, there are also “green” patent concerns. A [recent study](#) has shown the tremendous growth in patents issued for inventions, software and business methods that are aimed at environmental processes and problems. Because there is already so much controversy (and litigation) around software and business patents in general, it is a legitimate worry that the growing number of ecological patents could actually impede the progress of innovation in environmental sciences rather than promote that progress. Patent law, like copyright, is intended to promote innovation through a careful control grant of monopoly, but recent research has shown the significant danger that patents, and the cost of prosecuting and defending them, may be becoming an obstacle to innovation rather than an incentive; a [nice, but dated explanation](#) of the potential problems can be found here; this [book review of 2008’s “Patent Failure”](#) gives a more up-to-date review of the economic evidence that innovation is being stifled. Research into how to resolve our environmental dilemmas is too important to allow it to be slowed by the inefficiencies of our patent system, and adds another argument for the need for comprehensive reform of US intellectual property laws.

# Updates on NIH Public Access

*Tue, 12 Aug 2008 13:45:25, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

It seems like a good time to collect some of the interesting news items coming out lately about the NIH Public Access Policy, which has now been mandatory for just over 4 months. Most of these items come from Peter Suber's Open Access News blog, to whom we direct a sweeping tip of the hat.

First is the important [clarification that NIH issued about how author submission occurs](#). In greatly simplified language, the NIH outlined four methods by which submission can happen — publication in a journal that has an agreement to put all of its contents in PMC, arrangements with the publisher for deposit of a specific article, self-deposit of the article, or completion of the deposit process when the publisher has sent the final peer-reviewed manuscript to PMC. For more details, see the [NIH policy home page](#).

Next came this [report in Library Journal](#) that submissions to PubMed Central have more than doubled in the six months since the mandatory policy was passed by Congress.

Then last week [Oxford University Press announced](#) that it would begin depositing articles that are funded by NIH for authors. In effect, this means that Oxford authors will be selecting the fourth of the methods NIH has identified, which is much easier for Oxford authors than the self-deposit on which they had to rely up till now.

Finally there is this note from [Library Journal Academic Newswire](#), which both reports on the OUP decision and notes that NIH is confirming the fact that most journals which handle deposit for the authors are selecting a twelve month embargo on the articles, the longest embargo currently permitted by law.

Taken together, I think these reports indicate two things. First, the Public Access Policy is working, by which I mean that public access to bio-medical research is increasing dramatically without creating any real danger to the publishing industry. The announcement by OUP that they would cooperate in depositing articles indicates that publishers are coming to terms with the requirement and accepting it. Even the news that most publishers elect the 12 month embargo is a sign of growing accommodation; that overly-long embargo provides even the most skittish publishers enough security to adapt to the growing open access movement. Shorter embargoes are undoubtedly sufficient to protect publisher revenues, but the move to those shorter delays will have to take place gradually, as more and more publishers realize that, whatever the threats to their traditional business models are, NIH Public Access is not one of them.

Second, I hope that we are seeing an awakening realization on the part of scholarly authors that they have genuine choices as they consider how to disseminate their work. The soaring PMC submission rate, and the decisions by major publishers not to resist it, suggest that making submission easier for authors is rapidly becoming a competitive advantage. As authors realize that they have control over their work for as long as they retain copyright ownership, publishers might have to take on a service role they have never really played before, competing for the best scholarship by help authors meet the requirements of the funders who underwrite the research.

# The other side of the balance.

*Tue, 26 Aug 2008 10:17:04, ksmithl2@duke.edu, [category: authors-rights, category: fair-use, category: technologies]*

We are often told that copyright law is supposed to be a balance, offering, on the one hand, the financial incentive to creators that goes with monopoly rights and, on the other hand, sufficient exceptions to those monopoly rights to allow new creators to build on previous work. Without the latter half of this balance, creativity would effectively grind to a halt, and the incentive side would be useless. But most of the time, Congress and the courts seem to be serving the needs of those who want to profit from works already created at the expense of those who are trying to innovate and create new works. So it is especially pleasant to report on a couple of recent court decisions that can be seen as efforts to redress that imbalance and give some support to essential users' rights.

First, there was the [ruling in Jacobsen V. Katzer that essentially upheld the enforceability of an open source software license](#). Open source licenses are contracts (and that was part of the issue) that waive copyright, telling a downstream user that they are free to use the software in ways that would otherwise require permission, as long as they abide by certain conditions. In the Jacobsen case, such a license was challenged on several grounds — that it did not form an enforceable contract, that the [terms of the license were not real conditions but merely “covenants” without legal teeth](#), and that the license was an attempt to enforce so-called “moral rights” which are largely not recognized in the US. The Federal Circuit Court of Appeals rejected these challenges and sent the case back to the District Court to be decided as a contract and copyright infringement case.

What this essentially means is that an open source license — and this likely includes [the Creative Commons licenses often used in higher education](#) as well as the more technical software license directly at issue — forms a contract between copyright holder and user that allows the user to use the work according to the terms of the license and lets the rights holder sue for infringement if those terms are breached. This is how these licenses are supposed to work, and it is nice to see a circuit court affirm their proper functionality. This ruling will make it easier for academics authors and other creators to share scholarly work without relinquishing total control.

One interesting part of this argument was the assertion about moral rights. It is quite true that the US protects moral rights, including the right of attribution, only for a small group of visual artists. But that fact does not show why an attribution license is invalid, it shows why such a license better serves the needs of many creators, especially in academia, than copyright law alone does. With an open access license an author can leverage their ownership of copyright to enforce the right of attribution when the law alone would not do so. And attribution, of course, is usually the most important reward an academic author gets from her work. That is why this recent decision upholding these types of licenses is so important well beyond the sphere of software development.

The other important development was a [DMCA case that decided that, before sending a “takedown notice” alleging that some particular web posting infringes copyright, the rights holder must consider whether fair use would authorize the particular posting](#). This decision tracks the wording of the DMCA very closely, noting that the law permits takedown notices when the posting is not authorized by the rights holder *or by law*. Fair use, as the court correctly held, is a form of authorization by law (note my [previous post here](#) that noted that this has not been the case in previous DMCA practice). Therefore, a rights holder should not send a takedown notice in a case where a good faith consideration of fair use makes clear that the posting in question is not infringing.

The primary value of this second decision will be to limit the ability of rights holders to use the DMCA system to frighten people and to “chill” legitimate fair uses of commercial works. [The particular case involved one of those transformative uses that are so highly favored in the fair use analysis](#) — a 29 second homemade video of a baby dancing to the sounds of a Prince song. It should be obvious that such a video, even when available on YouTube, is not a commercial substitute for purchasing the song itself on CD or as an MP3. So the takedown notice sent to YouTube over this parent-posted video seemed abusive, designed more to intimidate than to protect legitimate commercial interests. Thus the court allowed the parents’ case against the rights-holder for misrepresentation under the DMCA to go forward, ruling that consideration of fair use is a prerequisite to the proper use of the DMCA takedown notice. This, too, is a victory for user’s rights and, even more important, for free speech in the digital world.

# E-textbooks: the state of play

*Fri, 29 Aug 2008 10:02:57, ksmithl2@duke.edu, [category: authors-rights, category: notes, category: digital-rights-management, category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies]*

As the new school year begins there has been lots of reporting about E-textbooks, and the welter of stories offers an opportunity to assess the overall state of play.

This [story from Inside Higher Ed outlines some of the “next steps” for E-texts](#), as well as the “remaining obstacles,” which are substantial. The article focuses most of its attention on two initiatives — a highly speculative report that Amazon wants to introduce E-texts for its Kindle e-book reader, and a description of the progress being made by CourseSmart in partnering with higher education. It is worth looking at these two projects, along with some other business models for e-texts, in light of some recently articulated needs and concerns.

A [recent study done by a coalition of student groups](#) expresses some doubts about digital textbooks that are worth considering as we look at different possible business models. The report raises three potential problems with digital versions: their alleged [failure to reduce costs](#), limitations on how much of an e-text a student is allowed to print, and the [short duration of access](#) provided by some licensing arrangements. These latter two concerns, obviously, support the contention that print textbooks are still serving student needs better than e-texts, especially if the digital versions are not significantly less expensive. To these concerns we might add one more — students like to be able to highlight and annotate textbooks, and digital versions that do not support this activity will be disfavored.

So how do the different business models fare in addressing these concerns?

One model is simply the distribution of electronic versions of traditional textbooks by traditional publishers. This seems like the least promising of the models, since it likely solves none of the issues raised by the student groups. It is interesting that the representative of traditional publishers quoted in the Inside higher Ed story made no reference at all to cost concerns but stressed the potential for e-texts to shut down the market for used textbooks. Unsurprisingly, the focus here is on preventing competition and protecting income, not serving the needs of the student-consumers.

CourseSmart offers a business model that is very little different from that the traditional publishers might undertake themselves. There is some [dispute about the issue of cost](#), however, with CourseSmart arguing not only that its digital versions of traditional textbooks are significantly cheaper, but that they remain so even when the income that students might usually expect by reselling their print texts is taken into account. It remains the case that that lower payment only purchases temporary access for the students and a restricted ability to print. Nevertheless, CourseSmart has been successful in arranging partnerships with San Diego State University and the state university system in Ohio, so it will be worth watching to see how those experiments develop, particularly in regard to student usage and satisfaction.

[Amazon’s Kindle is yet another possibility for distributing e-texts](#). We know very little about how such texts would be priced or what features they would have, but we do know that the desire of students to be able to print would not be fulfilled. This is an important issue for students, apparently, since the student report on e-texts found that 60% of students surveyed would be willing to pay for a low-cost print copy of a textbook even if a free digital version was available to them.

This latter fact is precisely what Flat World Publishing is counting on with their plan to make free digital textbooks available and also sell print-on-demand copies to those who want a paper version. [As I described this model a few weeks ago](#), Flat World is hoping to show that over the long-term, print on demand can prove a sustainable business model. Since this accords better with the expressed needs of student users than any of the above models, they might just be right.

The last model for distributing digital textbooks, one often overlooked in the debates (although endorsed by the student report mentioned above) but given some attention in [this article from the LA Times](#), is open-access. Frustrated faculty members are increasingly considering creating digital textbooks that they will distribute for free. Supporting such work, with grants of up to \$50,000, is another part of the initiative undertaken by the university system in Ohio. Ohio has long been a leader in supporting libraries in higher education, and this support for open access textbook offers a new avenue for leadership. The real “[costs we should be considering when we discuss e-texts](#)” include reasonable support for the work of creating such resources, as well as credit for the scholarly product of that work when tenure reviews come around. So much of the expense of textbooks comes from the profit claimed by the “middlemen” who distribute them that real efforts to reduce the cost of education must focus on ways to encourage in-house creation of digital texts (which is little different from how textbooks have always been written) and to distribute them directly to students, as the Internet now makes possible.

# Copyright FAQ for government works.

*Wed, 03 Sep 2008 19:56:52, ksmithl2@duke.edu, [category: notes, category: copyright-issues-and-legislation]*

There is a [nice website](#), just updated in August, that addresses a great many copyright questions as they relate to works created by the U.S. federal government, under contract with the government, or using government funding. The site is created by [CENDI](#) (the Commerce, Energy, NASA, Defense Information Managers Group), and also provides brief answers to more general copyright questions under the categories of “Glossary of Terms,” “Copyright Basics,” and “Use of Copyrighted Works.”

For scholarly authors, however, the biggest value of the site is the section answering questions about copyright in works created under a federal grant. As the website explains, copyright in works created using government grant money does not automatically belong to the government, but contract terms may place some restrictions on the use of those rights by the author. This is exactly the case with the NIH Public Access policy, where copyright is owned by the author of each article that is based on funded research, but it is subject to a contractual requirement that a non-exclusive license be given to the NIH for inclusion of the work in [PubMed Central](#).

Also, the site offers some guidance about using government works, an issue that often arises for scholars around everything from government survey maps to census data to photographs taken by active military personnel. This is not really the place to gain all of one’s knowledge about copyright, but it is an excellent source for understanding the complexities of using government works and creating works under various agreements with the government.

# Copyright use case on a Grecian Urn

*Sat, 06 Sep 2008 08:51:26, ksmithl2@duke.edu, [category: notes]*

A colleague recently asked my opinion about an interesting question. Would there be any copyright interest held by a museum that was displaying a classical vase for the first time? The root of the question was the idea that if the museum was displaying an object that had recently been unearthed (quite literally), it might be said to be publishing a previously unpublished work.

My opinion was primarily based on the inapplicability of the terms published and unpublished to this situation, but the question offers a broader opportunity to review an aspect of copyright law that seems to confuse a great many people.

One of the characteristics of intellectual property rights ownership is that it is entirely independent from the ownership of a physical object that embodies intellectual property. If I purchase a painting by a contemporary artist, I do not automatically get the intellectual property rights — the right to make copies or to distribute those copies, for example — along with the ownership of the object; I must contract for the transfer of the intellectual property rights, if I can, separately from the purchase of the object.

Likewise, owning an object in the public domain, like a classical vase, does not create any intellectual property rights. Simply by owning and displaying the vase the museum does not gain a copyright interest where there was no such interest before.

Displaying the vase will not have any affect on the nonexistence of copyright and probably would not meet the (vague) definition of publication. In any case, publication no longer makes much difference under our law. By current U.S. standards, an anonymous, unpublished work is protected for 120 years from creation and an anonymous work that is considered published would be protected for 95 years from creation; in either scenario, an object from classical antiquity would be well past any possible copyright protection.

3 quick caveats to this point:

1. A photograph of the vase could well have copyright protection, if it was sufficiently original to vest copyright in the photographer. Artistic decisions about lighting, angle, exposure and such probably do invest a photograph of a 3D object with the requisite level of originality.
2. Museums often charge for images of public domain objects in their collections. Even when the images do not have sufficient, separable originality to provide copyright protection, such charges can be based on the ability of the museum to restrict access to the unique physical object. For this reason many museums prohibit photography, in order to be the sole source of images of a public domain object on display.
3. There may be restrictions on the ownership of a vase from classical antiquity based on laws in the country of origin about protecting that country's cultural patrimony, as well as international treaty obligations to which the US is a party.

More generally, this question is a variation of one I hear quite often, about whether a republication of a public domain text or image somehow revives a copyright interest in that work. Except for a small window of unpublished works that were created before 1978 and then published during the five years



between 1997 and 2003, the answer is always no, not if the regular term of copyright protection has run or the work is otherwise in the public domain.

# Copyright in laws

*Wed, 10 Sep 2008 13:14:00, ksmithl2@duke.edu, [category: notes, category: copyright-issues-and-legislation]*

While it could be said that trademark and patent are close cousins to copyright law, there is no such thing as copyright's in-laws. The real question is, should there be copyright in laws?

Most people know at least vaguely that government works in the US are not subject to copyright protection. Of course, nothing is ever that simple. First, section 105 of the copyright law says that there is no copyright protection in works **of** the United States government, meaning only works created wholly by government employees in the course of their employment are unprotected; works created by others on behalf of the government may still have copyright (as I noted a few days ago here). Second, section 105 says there is no copyright in works of the **United States** government, meaning that the law is silent about works created by state and local governments. And that, apparently, is the rub.

Some time ago, the state of Oregon tried to assert that it held copyright in its state code of laws. After a brief skirmish with some advocates of open government, Oregon backed down from this claim, saying that, at least, it would not enforce any claim it had.

Now comes news that the same person who took on Oregon has been told to stop posting the legal code of the State of California — there are reports from [Slashdot here](#), [Techdirt here](#) (with lots of generally unenlightening comments), and the [Santa Rosa Press-Democrat here](#).

The argument against states and local governments asserting copyright in their laws and regulations is pretty straightforward — people should be able to access the rules of communal living that they are expected to follow. California, on the other hand, has an interesting reason for making its copyright claim; the \$800,000 it raises by selling print copies and digital access to its state code benefits the California taxpayer. And no matter what our vague intuitions might tell us, the federal copyright law does not prevent such a claim.

In fact, copyright claims even in national laws are not unusual; most countries with roots in the British empire, other than the US, have some version of “Crown Copyright.” But in the United States, at least, it is clear that the Copyright Office does not look kindly on these claims for protection in state and local laws, even if they are not excluded by statute. The [Compendium of Copyright Office Practices](#) informs examiners in the Office that:

Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments.

So the Copyright Office would decline to register such works as a matter of public policy, which would complicate any attempt by Oregon or California to sue to enforce the copyright claim. It also speaks volumes about the claim that copyright claims in public laws are intended to serve the interests of the public themselves; the Copyright Office apparently doesn't buy it.

The bottom line here is that anyone relying on the absence of copyright in government works has to be careful. Contractors who work for the government but are not federal employees may hold copyright even in US works, and the possibility of claims by state and local governments is very real indeed.

# Rough Week, judicially

*Tue, 16 Sep 2008 06:05:01, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

This past week has seen at least three developments in copyright law and legislation that all bode badly for higher education and user's rights. Each however, need to be seen in context, since none may actually pose the imminent threat that initially appears. This post will address the case decided during the week, the next will deal with some legislative developments.

There was a [decision last week at the district court level](#) in the case of the Harry Potter Lexicon that found that, even though the Lexicon is a transformative use that creates a new work with a different purpose than the novels on which it is based, it is not a fair use. The court enjoined the publication of the Lexicon and awarded the minimum possible damages (less than \$7000) to J.K. Rowling and Paramount Pictures in a decision that is really very carefully reasoned and that hews closely to the facts in the particular matter.

The director of the Fair Use Project at Stanford [discusses the decision here](#).

The court rejected a fair use defense based on this (abbreviated) analysis of the fair use factors:

1. The purpose of the use is mostly transformative, creating a reference guide to the series of novels, but this factor does not wholly favor defendants because of nearly complete, verbatim copying of two short reference guides that Rowling had already published (on fantastic creatures and quidditch) and because more of the novels are quoted verbatim that is reasonable necessary for the transformative purpose.
2. The original works are highly creative and deserving of the fullest protection permitted by copyright law.
3. The amount used, and its substantiality, is greater than is necessary for the transformative purpose. The judge explicitly declined, however, to find bad faith or to endorse Rowling's reference to "plundering," writing instead that the Lexicon author seemed to be carried away by his enthusiasm for the books.
4. While noting that Rowling is not allowed to corner the market for reference guides to her novels, the court held that there was substantial impairment of her market opportunities in two senses. First, the Lexicon would directly compete for sales with the two previously-published guides mentioned above (but not with the novels). Also, Rowling is entitled to license derivative works such as a musical production based on Harry Potter, and the reproduction of songs and poems in the Lexicon could harm this opportunity.

In many ways the decision reads sympathetically toward the Lexicon author and is critical of Rowling and her overreaching claims to absolute control over any writing about the Harry Potter series. I was especially pleased to see the judge single out the language used by plaintiffs of piracy and theft for criticism. In the end this decision is not as harmful as it could be. The potential in this case was for a broad decision that would severely limit the scope offered in many recent decisions for transformative uses within the fair use analysis. Instead this is a thoughtful decision that sticks very closely to the specific facts and does not do to much damage to the kinds of transformative uses that are important in

higher education. It is a reminder that scholars should be careful not to appropriate more of an original work than is reasonably necessary to accomplish a legitimate purpose — criticism, commentary or organization for reference. It is certainly a limitation on the freedom to copy even for such purposes, but it has not created the mine field for such works that could have resulted from a less considered opinion.

# Rough Week, legislatively

*Fri, 19 Sep 2008 05:25:41, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: scholarly-publishing]*

The other troubling developments last week involved legislative proposals to amend the copyright law. It is surprising that Congress should be so interested in copyright right now, what with an election coming up. Nevertheless, as [Public Knowledge phrased it on their website](#), there was a “perfect storm” of [bad] copyright activity last week.

First was the approval, on Sept. 11, in the Senate Judiciary Committee of a bill to (again) increase enforcement of intellectual property rights. This is mostly a [big gift to the major content companies](#), especially in its provisions to allow the government to prosecute civil suits for IP infringement, with the damages going to the content owners. The taxpayer gets to foot the bill, in other words, for Hollywood and the recording industry, something that is rather a recurring theme in these bills. The Enforcement of Intellectual Property Act of 2008 would also increase the number of cases in which civil forfeiture is possible — that means that property implicated in infringement could be seized, even if it belonged to innocent parties and even if it contained private data — and it would create more bureaucracy to oversee enforcement of what is, after all, supposed to be a civil action in which the plaintiffs traditionally have been responsible to enforce their own rights. This bill, which has incorporated much of the “PRO IP” bill about which I have written before, reverses that tradition and gets the government to do much of the work for private industry.

Also moving forward are the Orphan Works proposals. While it is still not clear if any definitive action will be taken, it does seem that the direction of amendments to the bill are more and more tending to render it useless for its purported purpose. As it becomes more freighted with burdensome requirements and limitations, it is increasingly likely that users of orphan works will continue to rely on fair use, just as they must do now. Thus passage of the bill will not likely accomplish its stated purpose of freeing up the huge amount of cultural material for which there is no rights holder to be found and no market to be harmed. For the sake of calming some very unrealistic fears, those who want to make culture and scholarship more widely available and usable will be left to make the fair use gamble that currently chills so much teaching and learning.

Finally, the winner for bad idea of the week was the poorly-named “[Fair Copyright in Research Works Act](#),” which could be more aptly called the “Taxpayer Pays Twice Act.” This bill is intend to reverse the NIH Public Access policy, about which I have written a good deal. Its intent, then, is to make sure that taxpayer funded research stays behind toll barriers so the those who paid to have the research done must pay again to read the results of their investment. Accountability is reduced, and nobody wins except the special interests who insist on uncompensated transfers of copyright before they will publish these works, then sometimes charge tens of thousands of dollars for subscriptions. There is a [story about the bill here on Ars Technica](#), and a summery of comments is available on the [Open Access News site here](#).

Perhaps the best news one can find about the “Fair Copyright” bill is that it is quite unlikely to be adopted this term, as “[Library Journal](#)” [reports here](#). The impact of this bill on scientific and medical research would certainly be regressive, denying research and taxpayers the chance to take advantage of the new opportunities offered by the digital environment. But it is also bad policy because it would enact into law an unnecessary and potentially damaging limitation on how the government can spend its money. The bill is structured to make it illegal for the government to place, as a condition of

government funding, any provision that would require the transfer or licensing of a copyrighted work. The potential unintended consequences here are considerable, as are the opportunities to force the government to spend tax money over and over again to gain the use of material paid for by taxpayers in the first place. Conditions on the grant of money is a major way Congress enacts policy, and no one seems to have examined how many contracts and grants might be invalidated, nor what the impact could be, if this legislation were adopted. Indeed, some of the impetus behind the bill seems to be a “turf war” over what policies can or should be pursued via appropriations; sponsor John Conyers explicitly referred to the need to defend what he called “sacred turf.” This bill is an object lesson in the harm that can be done when legislators listen only to the demands of a narrow group of special interests and to their own parochial prerogatives instead of the broader need to serve the public interest.

As with the [judicial decision reported earlier](#), these bills, with the exception of the last one, will not do much direct harm to academia. They would leave us where we are, while doing most of their damage to the public interest in general. But the “Fair Copyright in Research Works Act” is both terrible policy and potentially devastating to the progress of scholarly research. The positive impact of the NIH Public Access policy is beginning to be felt; choking it off at this point would be the height of foolishness. We seem to be able to relax for the remainder of this Congressional term, if the speculation is correct, but we should remain ready to fight tooth and nail if this poorly-conceived bill ever develops any real legs.

# Open Access Day @ Duke

*Tue, 23 Sep 2008 07:37:20, ksmith12@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Mark your calendars for [world-wide Open Access Day](#)! October 14, 2008 is being marked as Open Access day by three important organizations in the fight for more openness in scholarship and research — [SPARC](#), the [Public Library of Science](#), and [Students for FreeCulture](#).

The big international event will be a webcast feature Noble Prize Laureate Sir Richard Roberts and Prof. Philip Bourne, the founding editor of “PLoS Computational Biology.” This will be a wonderful opportunity to learn about the benefits of, and opportunities for open access, especially in the area of health and medical information and scholarship. More information about the webcast, and the celebration of Open Access Day in general, is [available at this website](#).

At Duke we also have some special events planned. The webcast will be received in two locations — in the Medical Center Library and in the Perkins/Bostock Library. Both opportunities will be a 7 pm, and participants will be able to ask questions of the presenters and also discuss the issues raised amongst themselves. There will also be an event focused on local efforts — OA @ Duke — in the afternoon of October 14. From 2 pm until 3:30 we will gather in Perkins Library 217 to hear about what is being done at Duke and what opportunities are available for scholars. Our keynote address will be by [Prof. Jamie Boyle](#) of Duke law school, and there will also be short presentations by Law Librarian Dick Danner, Dr. Ricardo Pietrobon of the Medical School faculty and [Duke student Josh Sommer, a passionate and articulate spokesman for patients’ rights](#). Tables will be set up in both libraries throughout the day to distribute literature and to allow view of several videos about the important role of open access to scholarship.

If you are in the vicinity of Duke on Oct. 14, please join us to learn and celebrate Open Access, at Duke and around the globe.



# Copyright creep?

Wed, 01 Oct 2008 11:27:01, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: technologies]

When I first became aware of the lawsuit filed by publishing giant Thomson Reuters against George Mason University to stop the release of the open source citation management program Zotero (hat tip to my colleague Paolo Mangiafico for directing me to [this story](#)), I wasn't sure how it was relevant to issues of copyright and scholarly communications. After all, this is essentially a licensing dispute; [Thomson alleges](#) that, in order to develop the newest version of Zotero, software developers at GMU "reverse-engineered" the proprietary .ens file format used by Thomson product Endnote in violation of a licensing agreement. Endnote, of course, is a [very popular tool in academia](#), and it is alleged that GMU is marketing its new version of Zotero with the specific boast that it now allows users to convert EndNote files into its own open source and freely-sharable file format

I cannot comment on the merits of the breach of contract claim, and I have no argument with the right of Thomson Reuters to use a licensing agreement to protect its intellectual property. Nevertheless, the idea of protecting these files, which simply organize data about books, journal articles and web sites into a form that can then be mapped into different citation styles, raises interesting questions about the scope of copyright law and where new and troubling developments might take it.

At least since the Supreme Court decided [Feist v. Rural Telephone](#) in 1991, we have known that facts and data are not themselves protected by copyright, and that collections of facts must meet a minimum standard of originality (greater than that found in the phone books that were at issue) in order to be protectable. I do not know if the file format EndNote has created to store citation data is such an original arrangement of data and, apparently, neither do they. Rather than rely on copyright law, they wrote a license agreement to try to prevent what they allege took place at GMU. But two questions still bother me.

First, should universities agree to licenses that prevent reverse engineering? In today's high-tech environment, reverse engineering is a fundamental way in which innovation proceeds. Our copyright law, in fact, recognizes the importance of such activities, providing specific exceptions to certain prohibitions in the law for cases of reverse engineering that have potential social benefits, such as encryption research or making materials available to handicapped persons. So one could legitimately ask if a court should consider the benefits of the research being done when deciding whether and how strictly to enforce a contractual provision against reverse engineering. In general, open source software is a gift that many universities like George Mason give to the academic community as a whole, and the value of that gift is increased if it is possible for scholars who have been using a costly commercial product to move their research resources from the latter into the former. That increased value (an "externality" in economic jargon) could be weighed against Thomson's loss (which they allege is around \$10 million per year) in reaching a reasonable decision about contract enforcement.

Second, will we see a movement to cover databases under some kind of database protection law, potentially separate from copyright, if corporate database vendors are unsatisfied with even the low bar necessary for copyright protection and with the need to use licensing provisions where that protection is unavailable? It is this kind of extension of intellectual property protection to subject matter that has traditionally not been protected that I mean by the phrase "copyright creep." Such *sui generis* protection (not rooted in copyright principles) has been adopted in the European Union, and it is common these days to hear complaints about it from scholars in EU countries. At a minimum, such

protection would raise costs for obtaining access to commercial databases and, as is shown by the Zotero lawsuit, could be used to stifle innovation and cooperation. The last attempts to introduce legislation for database protection in the US were several years ago — there is a [nice summary of those efforts and the issues they raised here](#) — but it is a topic that keeps coming back and about which higher education needs to be vigilant. In many ways our interests would cut both ways in any database protection debate, so it is a case where careful thought and balance would be needed.

# Stuck in the middle

*Mon, 06 Oct 2008 13:55:29, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation]*

It was with both a sense of resignation and a deep awareness of the irony of the situation that I read this short article in the Chronicle of Higher Education (and the comments that follow it) titled "[Free our Libraries, Cry University Presidents](#)." Such a brief report cannot convey (I hope!) all that actually went on during this "summit" of university presidents, but the article certainly implies that one aspect of the event was assigning blame to university libraries for our inability to make everything free for all on the Internet. The presidents in attendance, we are told, "urged libraries to halt what they described as an assault on the public's right to knowledge, done in the name of copyright."

It is, of course, both ironic and ill-informed to blame libraries for an assault on the public's right to know. Our professional organizations, after all, have an official and highly visible commitment to that right that is, as far as I know, unmatched by any other such group. To assign that blame because of libraries' regard for copyright deepens the injustice of the position, if that really is the stance that was taken. Copyright, of course, is a legal fact. It is also, at its core, a system designed to support "the public's right to knowledge." Librarians often believe, as these university presidents apparently do, that that system has become badly out of balance and is no longer serving the purpose for which it was created. But neither group may simply disregard it because they find it inconvenient.

What I find most interesting about the position, as it is presented in the article, is how accurately it reflects the uncomfortable space librarians and others who are concerned about copyright currently occupy in higher education. Many faculty members and administrators press us to tell them that what they want to do with copyrighted material is legal. Often they hold the simplistic view that anything done in the name of education is acceptable. Sometimes the sense of entitlement is more visceral than this, reflecting what I occasionally call (based on my background as a theological librarian) the "The Lord has need of it" syndrome. Librarians are often the ones who have to say "no" in many of these instances; we are the ones who usually have at least some training in copyright issues, and we are also the ones who sign the licenses for access to so many campus resources. Undoubtedly there are librarians who are overly cautious, as well as a few who adopt the same insouciant attitude they find in others on their campuses. But by and large, it is librarians who try to instill respect for copyright, at least as a good idea if not as a successful implementation of that idea, and who explain its limitations to our colleagues. And yet, from the other side, librarians are sometimes vilified by the major copyright holders as willful scofflaws; Pat Schroeder's remark, in her role as President and CEO of the Association of American Publishers, that all librarians are pirates is justly infamous. All this makes it difficult for librarians, committed as we are to access for all and to continuous learning and creativity, to know where to stand. The old saying that if you are making both sides angry at you, you are probably doing something right, may be true, but it is not very comforting for a profession founded on public service.

To be fair to the meeting that was held last week, however, it is important to recognize that the "cry" of "free our libraries" comes from a [paper prepared for the event by Richard Johnson](#), founding Executive Director of SPARC and a consultant for a major organization of academic librarians. His point in this short paper is not the overly simplistic one implied by the Chronicle article, but the more complex and nuanced argument that library partnerships with commercial interests need to be examined carefully and negotiated to promote a balanced set of interests that does not shortchange the public, especially in terms of access to public domain works. Johnson does not call for librarians simply to free themselves from the "bonds" of copyright at all; instead, he suggests quite rightly that:

we need new funding strategies, coordinated library action, and forward-looking principles to guide us. It's time to sort out the right roles and responsibilities for companies, libraries, governments, and private funders and to get about the work of building an Internet public library that puts the public first.

If this was the real focus of discussion at the Boston Libraries Consortium summit, even poor, abused librarians, caught, as they are, in the "no man's land" of the "copyright," surely can agree.

# Chipping away

*Fri, 10 Oct 2008 10:49:22, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management, category: technologies]*

Digital rights management, or DRM, is a delicate subject in higher education. Also called technological protection measure, these systems to control access and prevent copying are sometimes used by academic units to protect our own resources or to fulfill obligations we have undertaken to obtain content for our communities. Sometimes such use of DRM in higher ed. is actually mandated by law, especially in distance education settings.

But DRM systems also inhibit lots of legitimate academic uses, and they are protected by law much more strictly than copyrights are by themselves. A section added to the copyright law by the Digital Millennium Copyright Act makes it illegal to circumvent technological protection measures or to “manufacture, import, offer to the public, provide or otherwise traffic in” any technology that is primarily designed to circumvent such measures. The reason I say this is stronger protection than copyrights get, and the reason these measures can be such a problem for teaching and research, is that our courts have held that one cannot circumvent DRM even for uses that would be permissible under the copyright act, such as fair uses, or performances permitted in a face-to-face teaching setting.

It is frequently the case, for example, that professors want to show a class a set of film clips that have been compiled together to avoid wasting time, or wish to convert a portion of a DVD to a digital file to be streamed through a course management system, as is permitted by the Teach Act amendment. These uses are almost certainly legal, but the anti-circumvention rules make it likely that the act of getting the files ready for such uses is not.

To avoid the harshest results of the anti-circumvention rules, Congress instructed the Library of Congress to make a set of exceptions every three years using the so-called “rule making” procedures for federal agencies. There have been three rounds of such rule-making so far, in 2000, 2003 and 2006. Only in the last round was there any significant exception for higher education and it was very narrow, allowing only “film and media studies professors” to circumvent DRM in order to create compilations of film clips for use in a live classroom.

Now the [Library of Congress has announced](#) the next round of rule-making which will culminate in new exceptions in 2009. Higher ed. has another chance to chip away at the concrete-like strictures that hamper teaching, research and innovation. We need to be sure that the exception for film clips is continued, and try hard to see it expanded; many other professors, for example, who teach subjects other than film could still benefit from such an exception without posing any significant risk to rights holders. Ideally, an exception that allows circumvention in higher education institutions whenever the underlying use was authorized could be crafted.

There is a nice article describing the rule making process and its frustrations [here, from Ars Technica](#).

One of the things we have learned in the previous processes is the importance of compelling stories. The narrow exception discussed above was crafted largely in response to the limitations on his teaching described by one film professor who testified during the rule-making. The exception seems crafted to solve his particular dilemma. As another round of exceptions is crafted over the coming year, it will be important for the higher ed. community to offer the Library of Congress convincing narratives of the

other ways in which DRM inhibits our work and to lobby hard for broader exceptions that will address the full range of problems created by the anti-circumvention rules.

# Can Copyright kill the Internet?

*Wed, 15 Oct 2008 10:12:54, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: technologies]*

The question seems extreme, and it is certainly rhetorical. But the potential for copyright challenges to significantly limit the range of activities and services available on the Internet is very real, and severe limits on the full potential for digital communications could be imposed.

One of the great strengths of the Internet — its completely international character — is also one of its greatest weaknesses. Since laws change across national boundaries, but the Internet goes merrily along, online services can potentially be made subject to the most restrictive provisions found anywhere in the world.

In the US, for example, there is solid case law holding that thumbnail versions of images used in image search engines are fair use. The cases of [Kelly v. Arriba Soft](#) and [Perfect 10 v. Google](#) are solid examples of this principle. But fair use is a fairly unique feature of US law; it does not exist in most other countries. So when Google's image searching was challenged in a German court on copyright infringement grounds, they did not have fair use to rely on for their defense, and they lost the case earlier this week. The German court held that this valuable tool infringes copyright if the thumbnail images are used without authorization, even if the use is to provide an index that helps users actually find the original. There are reports about the decision [here](#) and [here](#).

How will Google react to this decision? First, they will almost certainly appeal. It is possible, ultimately, that they would have to employ some kind of technological measures that would prevent users in Germany from seeing the image search results with thumbnails, a [result that would ultimately harm business in Germany](#) more than Google. It is very unlikely that Google would have to shut down its image search feature, but multiple decisions might force a reexamination of how Google provides services worldwide. A similar case, involving the sale of Nazi memorabilia in France, led Yahoo to exactly that sort of system-wide change.

The general lesson here is that the current copyright regime throughout the world is in a fundamental conflict with the openness and creativity fostered by the Internet. Most companies today want to do business on the Internet, but few are willing to embrace the fundamentally open nature of the medium. The resulting conflict really does threaten to constrict the role the Internet can play in our lives.

The conflict is the subject of an [interesting article from The Wall Street Journal by Professor Larry Lessig](#) of Stanford, a short teaser for his forthcoming book "Remix." Lessig suggests that the copyright "war" over per-to-peer filesharing risks significant "collateral damage." That damage would come in the chilling effect that frivolous lawsuits and poorly-researched DMCA "takedown notices" could have on new forms of creativity and art — the products of the remix culture which, Lessig argues, offers a return to an era when amateur artists could thrive. This culture offers "extraordinary" potential for economic growth, according to Lessig, if it is not choked off by aggressive enforcement directed at a very different activity. To prevent that, he offers five changes that could make our copyright law less of a threat to the innovation and creativity the Internet encourages.

Will copyright kill the Internet? No. But copyright will need to be revised to account for the new opportunities that the Internet creates, lest we find ourselves unable to exploit those opportunities.

PS — This [story about the McCain/Palin campaign fighting back against DMCA takedown notices](#) that are being used to force YouTube to remove campaign videos that contain short clips from news programming, is another example (if we needed on) of the potential for abuse of the copyright system to chill important speech on the Internet. Good to see the McCain camp fight back, but I wonder if it is really YouTube's job to evaluate the merits of the takedown claims. A court recently told content owners that they must consider fair use BEFORE sending a takedown notice; I wonder if the better course isn't to pursue some kind of sanctions against those who send clearly unwarranted notices.



# OA @ Duke — why it matters very much!

*Fri, 17 Oct 2008 13:49:19, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

As part of our [Open Access Day celebration](#) at Duke, we held a keynote and panel event on Tuesday, Oct. 14th featuring Duke faculty and a student talking about why open access is important to them and important to Duke. About 50 staff and faculty members attended, and following is a brief summary of the very exciting talks we heard.

Prof. James Boyle of the Duke Law School and the board of Creative Commons began the afternoon with an entertaining and inspiring talk on why Open Access matters. He pointed out that the Web, which was designed to share scientific information, now works very well for sharing pornography or bargain offers for shoe shoppers, but really is not very effective at sharing science. The message of his talk was “Its the links, stupid” — the ability to build links into scientific work is key to speeding up the progress of science and innovation to the pace promised by this powerful technology. Linking permits all kinds of new discovery, whether through text mining or “waterhole searching” (following the tracks of other). But linking depends on information being freed from the access barriers that currently wall off most scholarship on the web.

Boyle offered a vision for open access based on three stages. At “Open Access 1.0,” scientific research and information will be exposed to many more human eyeballs. At the stage of Open Access 2.0, computers will have access to a depth of scientific information that will permit text mining for new and serendipitous discovery. Finally, with Open Access 3.0 computers and humans will work together to create a map of knowledge within in a given field and amongst fields where relationships were previously not discoverable.

Law School Assistant Dean for Library Services Melanie Dunshee followed Boyle with some interesting information about Duke Law’s ten-year-old experiment with open access to legal scholarship. Her talk gave a nice illustration of the path to open access, which consists in aligning faculty interests with the mission of the university to produce and disseminate knowledge. The services provided by the Law School Library, and the many new ways that faculty scholarship is exposed and promoted, made the point about how to accomplish that alignment very concretely.

Next up was Dr. Ricardo Pietrobon from the Medical School, where he chairs the group that is doing “Research on Research.” His presentation really built on Boyle’s call by suggesting that we need to move beyond text mining and data mining (once we get there) to consider what he called “scientific archeology.” Only at that point, when open access encourages not just access but replicability, accountability and transparency, will the promise of the Internet for scientific learning be fulfilled.

The climax of the afternoon, and what made the need for open access very real to our audience, was the remarks by Josh Sommer, a Duke student who was diagnosed with a rare form of brain tumor during his freshman year. Now three years out from surgery, Josh has refused to accept the “average” seven year life span of chordoma patients that he was given. Instead, Josh has co-founded the [Chordoma Foundation](#) and has himself become actively involved in research to understand and treat this disease. His story of how the privileged access he has as a Duke student has helped significantly in his research is only part of the story. He also tells of previously unknown connections between other forms of cancer research and the effort to treat chordoma that have been discovered using open access medical literature. Finally, Josh talked about his young friend Justin who died from chordoma earlier this year; a

young man who did not have the advantages that have given Josh the ability to fight his grim prognosis (see the link above for more on Justin's short life). As Josh puts it, there is no reason that the knowledge that could have saved Justin's life is walled off behind access barriers. Josh Sommer personified for our event the very message he wanted to deliver to those engaged in the effort to achieve more comprehensive open access to knowledge — perseverance.

# What does PRO-IP really do?

Wed, 22 Oct 2008 04:51:40, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]

President Bush signed the “Prioritizing Resources and Organization for Intellectual Property Act of 2008” — PRO-IP — on October 13, making it [Public Law 110-403](#). Since then a lot of news reports and blog posts have denounced the law, and I have noticed that a number of them claim negative aspects of the bill based on previous proposed versions. One article last week linked to a report about the bill that was a year old and announced an aspect (about which I also wrote way back then) that actually was removed from the bill as it was finally passed and signed. So I spent my weekend reading the actual text of the final, adopted version to see what was and was not still there. The link above, from Washington Watch, includes both the text of the bill as signed and some analysis of it; [here is a news report](#) that also reflects the content of the bill correctly..

First, what is not in PRO-IP? The two most objectionable features, from my perspective, were both removed before final passage. First, earlier versions included provisions that would have dramatically increased the statutory damages available in copyright infringement cases. The obvious purpose of this provision was to make more money for the RIAA when it sues file-sharers, since the structure of the change would have increased the potential penalty for infringing a music CD by 10 or 12 times. That provision was not included in the final version. Also dropped was a provision that would have allowed the Justice Department to pursue civil (as opposed to criminal) copyright lawsuits, a provision one commentator called making federal employees essentially *pro bono* lawyers for the content industries. Because the Justice Department itself objected to the provision, it was omitted as well.

So what is left? Plenty of taxpayer money being spent to help out a few large content industries is the short answer. The [Congressional Budget Office estimates](#) that PRO-IP will cost over 420 million over four years.

PRO-IP has five sections. The first, dealing with civil enforcement, lowers the procedural barriers for bringing infringement lawsuits, and it allows for seizure and impounding of allegedly infringing products while the lawsuit is pending. It also raises the statutory damages available for counterfeiting of trademarks. The second section “enhances” criminal enforcement measures in a parallel way. Primarily, it allows for the seizure and ultimate forfeit of infringing goods and any equipment used to infringe. The potential effect here is that computer equipment used for widespread and willful infringement could be seized in exactly the same way that cars and boats used for drug crimes are now taken by law enforcement.

With sections III and IV, PRO-IP really starts spending your money; over 55 million dollars a year is explicitly appropriated to increase federal and local enforcement efforts. At the top, a new executive branch official is created — the Intellectual Property Enforcement Coordinator, or IP Czar, as the position has been called — whose job is not to seek balance in our copyright law, as is arguably the role of the Registrar of Copyright, for example, but directly to expand the role of the federal government in protecting these private rights. The section also creates a new enforcement advisory committee, replacing an earlier group with one whose membership is significantly expanded. This group is specifically charged with gathering information about the alleged cost of IP infringement that is used by the industry in its lobbying efforts. Now taxpayers will pay for that research. Indeed, this federal official is essentially a Cabinet-level lobbyist for Big Content.

PRO-IP also requires the addition of over a dozen FBI agents to full-time IP enforcement; it is not clear if these are new agents or ones who will be reassigned from less high priority duties. Twenty-five million dollars are also allocated for grants to local law enforcement to pursue those dangerous file-sharers, and 20 million to hire more investigators for the Department of Justice. The bill closes with a “sense of Congress” section that heaps great praise on the content industries and repeats much of the propaganda that those industries distribute to support their claim that federal intervention to protect their out-dated business models is necessary. It also informs the Attorney General of the United States that IP enforcement should be “among his highest priorities.”

As is probably clear, I think PRO-IP is still bad legislation. The provisions that most threatened to have a further chilling effect on higher education have been removed, but the bill still, in my opinion, is a huge gift of money to the major content industries. The result will be that taxpayers will shoulder even more of the burden of fighting their desperate battle to prop up a business model that both consumers and the technologies they use have passed by. Instead of looking for new ways to enhance and market their products, these industries continue to resort to legal enforcement that is bound to fail (see this [report from the Electronic Frontier Foundation on the fruitless campaign of the past five years](#)), and they have now convinced Congress to invest much more taxpayer money in that effort.

# Deep impact?

*Fri, 31 Oct 2008 09:14:24, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: open-access-and-institutional-repositories]*

That a settlement between publishers, authors and Google over the latter's Book Search project was in the works was not exactly a well-kept secret over the past few weeks. Nevertheless, the announcement of the complex agreement has set many people buzzing, even before its provisions were fully digested. There is a collection of comments to be found [here, on Open Access News](#), and [Siva Vaidhyanathan gives his initial view here](#). As I read over the agreement, I am not sure its impact will be as deep, nor as [overwhelmingly positive](#), as many of the commentators have suggested. There is a nicely nuanced reaction to the agreement [here, from Jack Balkin](#) of Yale Law School.

First, it is important to realize that this is a proposed agreement to settle a pending law suit. It must be approved by the court and may change in its details during that process. The plaintiff classes in this class action suit are very large, so the process of notification will be complex and it is likely that class members will object and want to discuss changes in the agreement. This is not the final word.

I also want to note up front that this settlement would not resolve the fair use argument that is at the heart of the lawsuit; the parties have been very clear that they still have a significant disagreement over whether Google's activities to date infringe copyright or are authorized as fair use. A decision on that issue would have provided libraries with more guidance as we proceed (or not!) with digitization projects, but both sides in the case, I suspect, wanted to avoid getting to that point. The likely result, unfortunately, is that the next time someone considers pushing the envelope on fair use, there will be even more pressure to just pay the costs of licensing up front and not go down the fair use path at all.

Under this agreement, it seems likely that the availability of in-copyright but out-of-print books would improve in the Google Book Search. Google would be able to show both the "snippet view" for such works that is already available and a "preview" view that would display up to 20% of a work, although no more than 5 adjacent pages and not the last pages of a work of fiction. For out-of-print works this would be the default availability, with the rightsholders able to opt out. For in-print books, the rightsholders would have to opt-in. So while it seems likely that, overall, there will be increased access in the Google Book Search product, some in-print works will also likely disappear, even from the snippet view, as rightsholders elect not to opt in.

The participating libraries are in an interesting "in-between" position here. They have no voice in the settlement agreement, and it appears that, for some of them, the options for using the digital scans of books that they receive from Google will be reduced. That depends on how their original agreements were worded, and that wording seems to have varied among the partner libraries. Under this proposed settlement, the libraries that provide books for scanning can receive digital files for any title they hold in their collections, even if they did not provide the copy of that title that was actually scanned. But there are strict limits on how those files can be used. They cannot be made available for reading even on campus, much less linked into a catalog. They cannot be used for interlibrary loan, e-reserves or in a course management system. They are essentially preservation copies, although there is a provision to allow research based on "text-mining."

All libraries, of course, will be able to purchase institutional subscriptions which will give them access to the full text of many in-copyright works which publishers decide either not to opt out of this use (for out-of-print books) or which are opted in (for in-print works). We do not know much about the pricing

structure yet, but, given the rather small amount of money changing hands at settlement, I think that the publishers are counting on making significant profit here. It will be especially interesting to see if some of the partner libraries choose to subscribe to this more robust version of the database to get the level of access that is denied to them with the scanned files of their own works.

Consumers will also be able to purchase digital copies of individual titles; the pricing structure could allow prices anywhere from \$2 to \$30 per title, but that structure will undoubtedly undergo further revision.

Finally, there are provisions for free access to this “fuller-text” version of the Google product, via dedicated terminals. One such terminal would be offered to every public library, although it is not clear if public libraries that still lack broadband access would benefit much from this offer. A free terminal would also be available to “colleges and universities,” with one such terminal for each 10,000 FTE (one per 4,000 for community colleges). I am sure that the exact definition of what is a college or university for this purpose will be a matter of some debate. It is also interesting that no allowance is made for free access at the K-12 level.

For all three of these approaches to “access uses,” there are pretty strict limits imposed on cutting and pasting, and on printing.

Overall, I believe this agreement would increase access to a lot of books that are currently hard to find or even to know about. But there are significant strings attached to that access; for most people, it will probably come with a hefty price tag, which was not part of Google’s original, Utopian vision for its project. The strict limits on access, both to the libraries’ own digital copies of books and to the public “access use” versions, seem to be what [led Harvard to decide](#) to continue to withhold in-copyright works from the project and remain at its limited level of participation. Most troubling to me, however, is that this agreement would seem to move us one more big step in the direction of per-pay-use, where every library resource would be licensed and metered.

# A template for authors' rights, and a modest proposal

*Tue, 19 Aug 2008 15:03:08, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The [Association of Research Libraries](#) has just released an [article written by Ben Grillo](#), a librarian and law student working as an intern for ARL, that is advertised as a summary of the policies of twelve publishers toward deposit of NIH-funded research articles into PubMed Central. In fact, Grillo's article has a value well beyond the modest comparisons announced by its title.

I won't attempt to summarize Grillo's analysis or conclusions here; he writes so clearly and concisely that any summary would seem awkward and wordy in comparison. Suffice it to say that Grillo does a superb job of limning the ambiguities that need to be resolved as publishers come to terms with the new NIH public access mandate, as well as the competitive advantage that will be gained by those who resolve those unclear points quickly and fairly. The easier deposit in PubMed Central is made, the more a publisher will stand out from the crowd. But beyond its comparative analysis, Grillo's article provides a kind of template that authors should consider whenever they are confronted with the choice of publisher for their research and with a publication agreement. His lucid explanation of the various provisions in the selected agreements, which themselves are usually far from lucid, offers a model for what questions a scholarly author should ask of the agreements she sees and how she should think about the way those questions are, or are not, answered.

Two quick points struck me as I read Grillo's article beyond those conclusions that he reaches. First, I think many authors would be very surprised at just how limited their rights to make their own work available to others are when they sign publication agreements. We are often told that "most" publishers now support open access. But most also impose an embargo on such access, and during that embargo an author is often not able to place her own work on her personal website (about half the journals do not allow this, at least for the final author's version), and is very unlikely to be able to post the work to a disciplinary website or institutional repository (7 or 8 of the 12 journals examined by Grillo do not allow this). The very limited set of open access rights retained by authors under these standard publication agreements argues forcefully for the approach taken recent by the Harvard Arts and Sciences faculty to grant Harvard a license for use in an institutional repository *prior* to any transfer of copyright to a publisher.

The second thing that caught my attention is the brief notation, in a footnote to table 2, that Oxford University Press charges authors more for participation in their "author pays" open access program if the author is affiliated with an institution that does not subscribe to Oxford's journals. Authors' rights are thus directly and explicitly tied to institution's expenditure of monies with that publisher. No doubt this linkage between authors' rights and institutional subscription makes business sense to Oxford, and far from criticizing it, I suggest that institutions emulate it. Whenever we negotiate a new contract for a journal database, whether a new acquisition or a renewal, we should insist that the rights that authors at our institutions who publish with that publisher retain are spelled out. For some of us it has seemed inopportune to tie the rights of individual scholarly authors to our enterprise-wide subscriptions, but it is starting to seem more and more logical. The decision by Oxford to link its grant of authors' rights to the institutional purchase of its products convinces me that it is now time for our library acquisitions departments to start insisting that that linkage become a two-way street.

# “Fixing” Fair Use?

*Fri, 22 Aug 2008 14:49:46, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: technologies]*

Whenever I hear suggestions that fair use should be “fixed,” I am reminded that there are two very different usages of that term. When you get your car fixed, it is returned to the state where it performs as it was meant to do. When you get your dog “fixed,” however, that is not the result. So I approach all suggestions for fixing fair use from the perspective that we do not want to render that important exception to copyright sterile and, thereby, unusable. We may want to fix fair use like you fix a car, but we must be careful not to fix it like you fix a dog.

From this admittedly cynical perspective, I was pleased by what I read in [Mark Glaser’s “e-mail roundtable” on the question “Should copyright law change in the digital age.”](#)

Glaser asks two lawyers — Peter Jaszi and Anthony Falzone — and two experts in new media — JD Lasica and Owen Gallagher — how fair use might be changed to better accommodate new uses like remixes that are made possible by digital technology. Interestingly, none of the four suggest actually tinkering with the language of section 107 itself, and both lawyers point out that the vagueness of fair use, while it can be maddening, is actually a strength. Only a flexible and dynamic (to use Jaszi’s words) doctrine can truly be technologically neutral and create the space necessary to experiment with new media and new uses that were unimaginable to the drafters of the law. What makes fair use frustrating and uncertain also makes it adaptable and supportive of creativity. “Fixing” fair use by removing its vague reliance on factors that can be applied in any situation would indeed be like fixing the dog.

Instead, these four experts discuss what might be added to our law to make certain uses that have become prevalent in the digital age less risky. By creating “safe harbors,” for example, that essentially immunize certain acts, at least when done for non-commercial purposes, the fear of using fair use, and the cost of adjudicating it, can be reduced. Lasica goes further and suggests some additional positive rights that could be incorporated into the copyright law, such as the right to make personal back-up copies, to time-shift and to change formats. Both of these suggestions would leave the fundamental structure of fair use, vague and flexible as it is, intact; they would simply take some common digital uses outside of its purview. Fair use would still allow for new technologies and creative uses not yet conceived, but the cost of reliance on fair use would be reduced by specific exceptions for activities that are now well-known and clearly of benefit to consumers. These proposals exemplify the right way to “fix” fair use.



# Power, error and a “cruel historian”

*Fri, 26 Sep 2008 20:00:35, ksmithl2@duke.edu, [category: scholarly-publishing, category: technologies]*

There was a short but fascinating article posted on the [Association of College and Research Libraries' blog](#) earlier in the month called “[Information is Power — Even When it is Wrong](#).” Starting with a truly frightening story about how easily misinformation is spread on the web, librarian Amy Fry discusses some important lessons that we not only can, but must, learn about information in the digital age.

Misinformation is not new, of course, and in an election year we are reminded that it is probably most often distributed intentionally. But good, old-fashioned error can also account for much mistaken information, and Fry's article is a reminder of the tremendous and irreversible power that such errors gain; they quite literally take on a life of their own, and become, in some sense, as influential as truth.

Fry's lessons are deceptive in their simplicity; but they remind us that simple rules are often the best guide to practice. Her first rule — “Metadata is important” — codifies what librarians have known all along; information is only as good as its source, date and application. Two other rules remind us that the Web is a different, and frightening, place in many ways. That aggregators can mislead and that Google possesses enormous power to shape thoughts and beliefs on a massive scale are lessons too important for us to forget. And finally, there is the powerful truth that there is no substitute for critical thinking. If we all ever really learn that lesson, the world will be a much better place.

Fry's article reminds me of a book I have been reading lately, “[The Future of Reputation](#)” by [Daniel Solove](#). His analysis of how easy it is to be subject to a viral attack is another example of the new conditions we have to adjust to as scholarship, and so much else in our lives, begins to move at the speed of digital. Solove posits a fundamental tension, in the digital world of instant mass communication, blogs and social networking sites, between freedom and privacy. We now have the means to express ourselves more freely and fully than ever before, and to make a potentially permanent record of the things we say about ourselves and others. The danger, of course, is that “the Internet is a cruel historian” that allows others to easily discover all the things we have written about ourselves or that others have written about us, whether they are true or not. Privacy and reputation are in jeopardy from this new expressive freedom.

Solove's book is sobering from many perspectives, including as a reminder of the world in which scholarship is carried out today. With so much preliminary work on scholarly ideas being done by e-mail, in GoogleDocs, or on blogs, we need to remember that our tentative ideas and first drafts, our wild proposals and our silly comments, may not ever really be completely gone. Errors and misstatements may live forever, and they may spread around the world in seconds; it will now require a special effort to ensure that there is a final “version of record” of any piece of scholarship, something that has not been much of a concern in the past. There are tremendous opportunities for collaboration and more open commentary and correction in digital scholarship, but it is also an environment that requires a new level of awareness and attention.

# Just ‘cause you’re paranoid...

*Sun, 26 Oct 2008 07:02:23, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: technologies]*

When I wrote a post about a week and a half ago called [“Can Copyright kill the Internet?”](#), I worried that my title might be considered a little bit extreme. After all, the Internet is a big, sprawling “network of networks;” surely the puny efforts of legal enforcement cannot really do that much harm. In some senses this is true, since it is difficult to apply national laws to the persistently international Internet. On the other hand, as I pointed out in the earlier post, a business wanting to engage in commerce on the Internet has to take account of national laws around the world, and is frequently circumscribed by the most stringent law to be found regarding any particular activity.

But what really convinced me that my earlier post was not exaggerating the threat was this news item from Ars Technica called [“Net filters “required” for all Australians, no opt-out.”](#) Incredibly, to my mind, at least, Australia is moving ahead with a plan to force Internet Service Providers to impose filters on ALL Internet access in the country to filter out “illegal” content. The government would maintain two “blacklists” of material that must be blocked. Australians who requested “unfiltered” access would not have material on the “additional material” blacklist blocked, but there would be no way to get access to Internet sites that the government deemed illegal and so put on its principle list of blocked content.

There are many problems with this plan, but I want to focus on two. First, filters never work. It is usually possible to get access to “bad” content in spite of the filter, and filters almost always filter out useful content as well as the bad stuff. In the case of this plan, the task of updating the blacklist will be monumental, as banned material can switch locations and URLs faster than the content police can keep track. And even when content is blocked, the blocking itself will serve as a challenge to many sophisticated computer users to find a way around the filter and gain access to the site. Digital locks are usually broken in a matter of days, and the unfortunate result of filters has always been that law-abiding users find their choices of legitimate content constricted, while those who want to violate the rules find ways to do so.

The other problem, of course, is deciding what constitutes “illegal” material. Few would dispute the need to reduce the amount of child pornography available on the ‘Net, but there are lots of other categories of sites where there is a legitimate debate. What is defamatory in some countries, for example, is protected as political speech in the United States. Will Australian officials be able to keep criticism of government policies (like this) off of Australian computers by declaring it “illegal” because potentially libelous? What about material that potentially infringes copyright? Will all such material be blocked? And how will that determination be made? Many sites — YouTube is the most obvious example — contain material that is authorized by the rights holder as well as videos that are clearly infringing. Is YouTube a legal or an illegal site?

Ars Technica has followed up its original post with [this one noting that the government in Australia is trying to suppress criticism of its plan](#). This strengthens the fear that the filtering plan might be used to silence opposition, even though there ought to be a clear distinction made between what is illegal and what is merely dissent. The article also notes that the point made above — that filters seem seldom to work very effectively — is being borne out in this instance.

So here is a concrete example of terribly bad policy that really does threaten the existence of the Internet as the revolutionary tool for democratic communication that it ought to be.

# Looking for the devil in the details

*Fri, 07 Nov 2008 14:09:36, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

The more I read the Google Books settlement agreement, and the commentary it has spawned, the more I become convinced of two things. First, this beast of a document will keep many lawyers in business and give many librarians headaches. Second, it is the things we do not know that will be most troublesome. The following is an unsystematic list of issues that I have been thinking about regarding the agreement, with no particular order and few definite conclusions.

**Advertising** — Perhaps it should be obvious, but Google Books is about to take on a very different look, as it becomes populated with advertising. Up til now, Google has not sold advertising for these pages, probably to avoid undermining its fair use argument. At this point, the only commercial links one gets when doing a search in Google Books are those to sources from which one can buy the books. The settlement agreement explicitly authorizes advertisements on the Preview Use pages and anticipates ads on the results pages as well. The agreement provides for the standard 70/30 split for advertising revenues (the Registry that represents publishers and authors gets the larger percentage), so it is now in the interests of the rightsholders to permit and encourage advertising. This is not shocking, but it does further detract from the “social benefit” justification that Google has used for years and that has made it so appealing to librarians. Book searches on depression or Alzheimer’s being used to sell the latest fad pharmaceuticals to treat those conditions might cause libraries to rethink the place of even free access to the Google product in their overall mission.

**Orphan works** — Does this agreement really spell the end of legislative attempts to reduce the risk of digitizing books that are still in copyright protection but for which no rightsholder can be found? Larry Lessig certainly implied that it does in his [initial post reacting to the deal](#). Consider that there will be much less incentive to adopt such a proposal if many of the works involved are available for viewing via institutional subscriptions to Google Books or even for individual purchase. By making allowance for unclaimed funds coming into the Registry that the settlement agreement will create, Google and the publishers clearly expect to make money off of orphan works. As I suggested earlier, pay-per-use may well replace legislative attempts to refine the balance between rights protection and socially valuable uses, and libraries that want to make obscure works available to a broader public will be the losers.

It is worth noting that the agreement itself makes some allowance for the adoption of orphan works legislation, providing that both Google and the Fully Participating Libraries can take advantage of such legislation if it ever becomes law. What we do not know is whether or not the Book Rights Registry would become available to users who wanted to use orphan works as part of their diligent search for rightsholders; it would be a tremendous resource but, at least initially, it is structured as a closed and private database. See [Georgia Harper’s interesting post on this issue here](#). We also don’t know if the agreement will have such a pervasive effect that Congress will not bother to take up orphan works in the first place; they certainly have not been on fire to do so up to now.

**Defining the public domain** — I have complained before that Google has used a very narrow definition of the public domain, especially in regard to government publications. On this score, the agreement seems to move things in a positive direction, at least in regard to the contents of the Google Books product itself. Google has argued that it had to be careful about using government works because of the possibility that they would contain “inserts” (to use the term now adopted in the settlement agreement) for which there could be a continuing copyright interest. This agreement would seem to

remedy that concern by allowing for uses of such works unless the owner of the rights in the insert objects. Even then, Google can appeal the objection using the dispute resolution procedure specified. The restrictions on other public domain works that are still commercially available seem sensible to me. If a PD work contains an insert to which a copyright interest still adheres (an introduction, for example), then all earlier editions of the PD work *that contain that insert* are treated as commercially available (and therefore “non-display”). Editions without such inserts will remain in the public portion of the Google database. On the other hand, out-of-print editions of a work that is still in copyright and is commercially available in another edition will all be treated as commercially available.

**Future publications** — One of the trickiest aspects of understanding this document is the definition of “books” that it uses. Careful reading indicates that that term encompasses only works that are in copyright protection and registered with the Copyright Office as of the settlement date. That means that this agreement deals only with works already published; it does not seem to tell us anything about how or if Google will deal with books (in the non-technical sense) published in the future. The obvious conclusion is that publishers will be able to opt-in to all or some of the “display use” (snippets, preview, sales of institutional subscriptions or individual titles). I wonder if such new publications will be subject to non-display uses (text minig, i.e.) when and if Google scans those works, or if those too will be opt-in only. I also wonder what will happen when works published after the settlement go out of print. Will publishers have to opt them *out* of display uses at that point, or will the original opt-in still control? Finally, how often will the database to which institutions can subscribe be updated, and how will the effect of new content have on the price for that product be determined?

Commentary that is worth reading about the settlement agreement includes:

[Karen Coyle’s “pinball” comments here.](#)

[Open Content Alliance’s objections here.](#)

This Washington Post [article on Google’s New Monopoly](#) (requires free membership).

PC World’s article on [how business considerations have trumped ideals in this negotiation.](#)

# Creative Commons and credit

*Wed, 12 Nov 2008 14:02:16, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The November 2008 issue of [College and Research Libraries News](#) contains a lucid explanation of, and a convincing argument for using, the Creative Commons licensing system. The article, “[The beauty of ‘Some Rights Reserved’](#)” by Molly Kleinman, is a concise and cogent explanation of the CC system of licensing materials to permit sharing of creative and scholar works, as well as that reuse of protected material that is so necessary to “promote the progress of science and the useful arts.” Kleinman describe efforts at the University of Michigan Library to teach faculty about the benefits to authors, teachers and scholars of using Creative Commons licenses, and her ability to explain the licenses so clearly must be a great boon to that effort.

I want to give the link to the “Get Creative” video that Kleinman references as an important part of their teaching of the CC licenses, since the link in the online article’s footnotes did not work for me — <http://mirrors.creativecommons.org/getcreative/>. This too is worth a look for anyone who wants to understand how Creative Commons licenses work and wants to be entertained in the process.

But I also want to add a suggestion about one more point that might help convince faculty that a [Creative Commons](#) license on their works will serve them well. In her section on the “benefits of Creative Commons in academic settings,” Kleinman emphasizes the large numbers of works available under CC licenses and the ease of reuse that those licenses make possible. I want to add that CC licenses actually serve the fundamental values of academia better than does our copyright law in its current state.

Almost alone amongst the copyright laws of the world, our US law does not enforce any right of attribution. Most countries recognize some “moral rights” that are often treated differently than the economic rights which are the sole subject of US law. Attribution — the right of the creator to have his or her name associated with the work — is the most basic of these moral rights. But that right is simply not protected in the United States except for a small group of visual artists who are entitled to attribution under a provision added to the copyright law in 1990.

Does this absence of an attribution right make any difference? It certainly can. There was a story in the higher education press about six months ago about a professor who found that his short book, published several years before and since out of print, had been incorporated whole into a larger work from the same publisher that carried the name of a different author. Because the professor had transferred his copyright to the publisher, and the US has no moral right of attribution, he had no recourse to continue to get credit for his own scholarship. For an academic author this is a dreadful fate, since scholarly publication is done more for reputation and standing in the discipline than it is for money ([Samuel Johnson’s famous remark](#) notwithstanding).

In an 2004 article on “[The Right to Claim Authorship](#),” Professor Jane Ginsburg of Columbia describes the importance of an attribution right and discusses how other countries have structured that right for good or ill. On the need to protect attribution she quotes an unnamed federal judge to this effect:

To deprive a person of credit to which he was justly entitled is to do him a great wrong. Not only does he lose the general benefit of being associated with a successful production; he loses the chance of using that work to sell his abilities.

At the end of the article, Prof. Ginsburg proposes what the contours of a US attribution right might look like. Her proposal makes a great deal of sense to me, but, and this is my point here, authors who use the Creative Commons licenses do not need a Congressionally recognized right of attribution because a CC license effectively leverages copyright ownership to ensure that the author gets proper credit. In essence, a CC license, with its attribution condition on reuse, is a private law arrangement to effectuate what our public law has failed to do.

Because reputation is the foundation of the academic reward system, and giving proper credit to authors and creators is the most basic tenant of academic ethics, the protection of attribution is a fundamental value of scholarship. And since the Creative Commons license protects attribution, and our copyright law by itself does not, the value of the former for those who live within the academic system and embrace its values is vastly increased.

# Keeping up with the world

*Thu, 20 Nov 2008 18:42:56, ksmith12@duke.edu, [category: open-access-and-institutional-repositories]*

At the SPARC Digital Repositories meeting earlier this week, I was particularly struck by the remarks about the policy environment for open access scholarship in Europe made by David Prosser of SPARC Europe. Without any apparent intent to be boastful, Prosser began his address by telling us that the policy argument in favor of open access has been won, and he proceeded to back up that assertion pretty effectively.

First, Prosser cited three separate studies of research policy in Europe that all concluded that open access was a necessary component of the ambitious European Community imperative to develop a highly competitive knowledge-driven economy. These reports all seemed to recognize that public access to scientific research is a prerequisite for increasing the pace of scientific and technical innovation.

Next, Prosser reminded us of the major funder mandates for open access. The private Wellcome Trust lead the way, but now six of the seven research councils in the UK have followed suit by requiring open access to funded research within six months of publication (not the one year embargo permitted by the US NIH mandate, which is currently subject to an attempt in Congress at reversal, even though that requirement is much more publisher-friendly). Most recently, the Irish Research Council for Science, Engineering and Technology has adopted a similar mandate for funded research. All these funders of research recognize that open access is not just a nice thing to do for the public who puts up the money, but is a fundamental step toward remaining competitive in today's digital environment.

The same recognition surely underlies the decisions by nine European universities that have adopted self-archiving policies that ask or require faculty to deposit their published research in an institutional repository. This, too, is an important step toward a new level of scientific competitiveness for the European Community, and a failure to follow suit will be a threat to the US ability to maintain its pride of place in research and scholarship.

After Prosser's talk, Syun Tutiya from Chiba University spoke about the open access policy environment in Japan. Although their successes are more modest than those detailed by Prosser, Professor Tutiya ended his remarks with a telling challenge to the US and our ability to compete in the global environment. Speaking about the need for international collaboration, Tutiya said that Japan was ready to collaborate, and Europe was ready, but you (the Americans who made up the majority at the meeting) are not ready. Until we take the importance of increasing access to fundamental scientific research more seriously and stop treating it as a political power struggle, we will not be ready to collaborate or, I am afraid, to compete with the rest of the world.

# Calling for better policies

*Tue, 25 Nov 2008 12:09:48, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: scholarly-publishing]*

Unfortunately, I had to leave the SPARC Digital Repositories conference to catch a plane before the closing keynote address by David Shulenberg, VP for Academic Affairs at [NASULGC](#), but there is a nice write up about his remarks [here in LibraryJournal.com](#). Shulenberg outlined seven steps to help academia weather difficult economic times and still “get to the next level” in scholarly communications. Given the context, it is no surprise that the emphasis was on creating digital repositories. I would note that his first step is for each university to be sure that a repository is available for their faculty, which is not quite the same thing as saying that every institution must have its own digital archive. The possibilities for collaboration and sharing are precisely what have burgeoned in the digital environment, and it is important to remember that we can share infrastructure as well as the scholarship that infrastructure is designed to support.

The point I want to emphasize, however, was Shulenberg’s third step, in which he called on faculties and administrations to discuss current intellectual property policies and practices. This is innocuous enough until Shulenberg delivers the punch line — “emulate Harvard.” The point, of course, is that faculty should not surrender their copyright without thought and negotiation when publishing their scholarly output. The time when that was a sensible or practical way of doing business is simply past, now that the digital environment offers so many new ways to disseminate research and scholarship. The earlier part of Shulenberg’s remarks included a “calling out” of university presses and some scholarly societies for their support of the lawsuit against Georgia State and of legislative attempts to reverse the NIH Public Access policy. The key to resisting these efforts to hamstring broader access to scholarship is precisely in this point — if faculty do not give away their copyrights, but rather give only licenses for publication, they will retain control and can use their work, and let others use it, without fear of being sued for infringing the copyright in works they or their colleagues produced in the first place.

The other appeal for better policies around copyright and intellectual property is [this article in the ARL Research Bulletin](#) by the President of NASULGC, Peter McPherson. McPherson makes the point that colleges and universities are at the heart of the purpose of copyright to “promote the progress of science and the useful arts.” To do that, he argues, we need to resist the trend toward every greater protection that has tilted the balance of the copyright bargain away from its core purpose. He recommends that higher education work in concert to develop a comprehensive set of policies and to create a structure to advance those policies with lawmakers. He argues quite correctly that our voice has been fragmented and unfocused, while those who believe, in opposition to the constitutional purpose of copyright, that they are entitled to squeeze every penny from each copyrighted work, speak in unison.

McPherson makes an excellent point, with which I want to close, when he notes that no single strategy will address all of the issues and all of the needs that arise around intellectual property within the academy. It is precisely this need for creativity and flexibility that so urgently requires that we cooperate to develop an appropriate set of strategies, rather than each pursuing our own favorite issue or solution. McPherson writes:



a “solution” to fully address some of the contemporary challenges we face in the intellectual property arena may be a combination of further legislation, public licenses, market-based allocation, or market-modification allocations.

I think this is exactly right, but would point out that the fundamental point made above, that IP rights can not simply be ceded away in exchange for traditional publication, is a prerequisite to any and all of these strategies. Higher education should welcome the leadership of NASULGC, exemplified in these two articles, on this issue.

# Two cases that could shape copyright

*Mon, 01 Dec 2008 08:05:30, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

Two interesting cases were reported in the past weeks by [Zohar Efroni, a non-resident fellow at Stanford's Center for Internet and Society](#). One could have significant impact on the shape of US copyright law, especially as it serves to encourage or hamper technological innovation, and the other suggests, to me at least, an interesting international model that could help mold US thinking about fair use.

The first case, decided in August by the Second Circuit and recently appealed to the Supreme Court, involves the legality of the remote storage digital video recording (RS-VDR) services that large cable companies want to offer to their customers. In [Cartoon Network v. Cablevision](#), the 2d Circuit reversed a lower court's ruling and injunction, and held that Cablevision was not directly infringing the copyrights held by television companies when it allowed consumers to select programs that would be recorded and stored remotely, on servers owned by Cablevision, for playback to the specific consumer when they request it.

The RS-VDR argument raises once again the Sony Betamax case, in which the Supreme Court held that a substantial non-infringing use of a video cassette recorder — the fair use by consumers for “time-shifting” TV programs recorded for the personal viewing — meant that the device manufacturer was not guilty of copyright infringement, even though it was acknowledged that there were potential infringing uses of the VCR. This was a landmark case that made possible a great deal of technological innovation, since it removed the chilling effect that would have inhibited the invention of any new device or service that might be used to infringe a copyright. The Grokster case about filesharing software gave the Court a second look at the Sony ruling, and opinions differ, even on the Court, about how much that doctrine was changed. In Grokster, the Court ruled against a technology that did have potential non-infringing use because its actual use was overwhelmingly infringing and its marketing actively and knowingly encouraged infringement. Now the Supreme Court might once again revisit the fair use underpinnings of so much technical innovation if they elect to hear an appeal of the Cablevision case; [Efroni's comments on the arguments asking the Court to intervene are here](#).

The other case is one from German and involves music sampling. The judge in this case, [reported by Efroni here](#), found that sampling does not infringe the copyright in the original music. The result that is much more sensible than similar approaches to the issue in the US, although it has several “catches” attached to it, as Efroni notes. It is one of those catches, in fact, which captured my attention. The decision is based on a provision of the German copyright law translated as “free use” (freie Benutzung), which is not the same as fair use in the US. Efroni suggests that we think of free use in Germany as “an extreme version of the transformativeness element familiar from the U.S. fair use analysis.” Since one of the problems with any discussion fair use is separating the notion of transformativeness (which is not a defined element of fair use) from the exclusive right granted to copyright holders to authorize derivative works, I was struck by the possibility of separating transformative uses (under this category of “free use”) from the four-factor analysis. The many recent decisions upholding transformative uses as fair use have pretty well jettisoned the four factor approach in any case; once they decide that the purpose of the use is transformative, things like commercial versus non-commercial, the nature of the original and the amount used are usually held to be irrelevant. Impact on the market for the original is also usually discounted, since courts hold that the market for a transformative use does not compete with that for the original.

This transformative approach to fair use has been extraordinarily fruitful, supporting all kinds of scholarship and creativity. But it threatens to swallow up the fair use analysis as it has been carried out for almost two centuries and as it was codified in section 107, automatically dismissing as an infringement any use at all that is not transformative and struggling to find transformation in any use that a court wants to allow. So I think it might be worth considering adopting a provision like free use, that would allow an uncompensated use of a prior work to create something new under a set of conditions more appropriate to that situation than are the four fair use factors. Then fair use could be left in place to permit those socially beneficial uses that do not meet the standard of transformativeness but still serve the fundamental purpose of copyright law to encourage and protect creativity and innovation.

# Security blankets?

*Fri, 12 Dec 2008 10:50:26, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation]*

The report that some major music companies are considering a blanket licensing arrangement with college campuses whereby the schools would pay into a central collecting agency and the music industry would stop its campaign of litigation, has, quite understandably, generated a lot of Internet buzz. Neither the technorati nor academia really seem sure how to react. To the folks at [Techdirt, this is a terrible idea that would amount to a “music tax.”](#) At the [Electronic Frontier Foundation](#), on the other hand, this is official sanction for an idea they have been advocating for a long time. [Ars Technica is more cautiously optimistic](#), and warns against a knee-jerk reaction that anything proposed by the music industry must be bad.

What caught my eye in all the debate, however, was a quote in the Ars Technica piece, attributed generally to EDUCAUSE, in which the licensing scheme was described as “a covenant not to sue.” Certainly an end to the lawsuits and threats of lawsuits directed against students who share music across campus networks would be welcome. But I find the phrase a dangerous gloss on blanket licensing schemes, and it prompts me to consider just how much security these blankets really offer.

The starting point, of course, is to recognize that a license, even a blanket license, is private law — a contract between parties that is binding only on those parties. Such licenses do no impact the rights or obligations of anyone who is not part of the agreement. Thus if three of the four major record labels signed up for a blanket license, and thus promised not to sue college students, the fourth label could continue to pursue such lawsuits unimpeded.

Recognizing this legal situation is especially important for understanding the [Annual Campus License offered to institutions by the Copyright Clearance Center](#), which is a blanket license that much more directly impacts the scholarly communications system. Under that license, some percentage of the publishers who license their works through the CCC (thus a percentage of a portion) agree to accept a blanket payment in exchange for permission to make all of the uses of covered content that the campus wants for the year. Uses covered by the license include classroom distribution, e-reserves, inclusion in a course management site and course packs, but not interlibrary loan. The license applies only to textual material produced by the participating publishers; music and video, as well as text published by non-participants, is simply outside its scope.

Campuses seem to approach this license in two different ways. Some see it realistically as but one tool in the struggle to use copyrighted content in responsible ways. For those campuses, the license may help save time and make costs more predictable, but it will not necessarily streamline the permissions process, since it will require that each work for which permission is needed be checked against the list of participants in the license and individual arrangements sought for items not included therein. Other campuses regard the ACL as a kind of covenant not to sue, assuming that they are safe, or at least safer, regardless of how careful (or not) their permissions process is, as long as they pay the large cost of the license. By this logic, finding the items used that are both infringing (i.e. not fair use) and not covered by the license would be a difficult and unrewarding task for potential plaintiffs, even if they do not participate in the ACL. And there might even be peer pressure within the publishing world not to go after ACL subscribers, since they have an agreement with, and are paying lots of money to, many of the big players. The CCC is careful not to endorse this view of the license, but there are persistent whispers

along these lines in the academy and even some anecdotes about individual marketers making these types of assurance “on the QT.”

One aspect of these blanket licenses that I think deserves attention on college campuses is their resemblance to the “big deals” for periodical databases that many academic libraries signed onto in the past decade or so. In those deals, a high but relatively predictable price is paid for access to lots of content, a significant portion of which is probably not really usable in the specific setting. Some libraries have come to regret these deals and to long for the days of disaggregated purchases of content, when decisions could be made based on actual expected use; the classic cost/benefit analysis. A similar dynamic seems likely around blanket licenses, and institutions may have even less control over their costs with copyright licenses than they did with the big serials purchases. In the serials world, we typically negotiated around two cost control mechanisms — the ability to cancel some small percentage of little used journal titles within the scope of the larger collection and/or a cap on the annual increase in subscription fees. It seems unlikely that the licensors for either the music or the publishing industry would agree to allow campuses to delete some providers whose content they do not expect to use from the license in order to reduce costs. And we just do not know what annual price increases will look like for these licenses. Finally, we should remember that these licensing deals, backed as they are by the threat of lawsuit, will be even harder to get out of, once a campus has signed up, than the big serials agreements have been. That fact, and its implications for budget planning, should give us pause as we consider how much security these blankets really offer.

# From foreign courts,

Sat, 20 Dec 2008 11:39:22, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation]

come two cases that offer interesting lessons for US observers of the copyright environment.

First, there is a case from Canada that allows us for once to be grateful for at least one aspect of US copyright law. In a [case involving a parody newspaper](#) that made fun of the coverage of the Middle East provided by the newspapers of Canwest, one of Canada's leading media conglomerates, the Supreme Court recently ruled that [there is no exception to infringement for parody](#). The court went on to cite its own earlier decision that [freedom of expression is not a defense to copyright infringement](#). In that case, the court wrote that "the Charter [the Canadian Charter of Rights and Freedoms] does not confer the right to use private property — the plaintiff's copyright — in the service of freedom of expression."

The law in the US is entirely the other way on this point — parody is a well-established purpose that is favored in the fair use analysis, and fair use as a whole has been recognized as the safety valve in copyright law that supports free speech. It is easy to see why this is so; if a copyright owner could prevent parody by claiming copyright infringement, it would be possible to suppress a lot of speech that would otherwise be constitutionally protected. Consider the case of the parody of "Gone With the Wind" that tells the story from a slave's perspective and is called "The Wind Done Gone." The estate of Margaret Mitchell wanted to prevent publication of "The Wind Done Gone" and succeeded in convincing a district court to enjoin the book on the basis of a copyright infringement claim. Fortunately, the [11<sup>th</sup> Circuit Court of Appeals understood that our copyright law is not intended to suppress speech](#), and that sometimes use of another's copyrighted work is necessary in order to express a particular point, especially when parody is afoot. Free speech, in this sense, trumps copyright ownership, and, on that point at least, Canada could take a lesson from the US.

The other case is from Great Britain and involves the ownership in the copyright to a classic song from the 1960's — [A Whiter Shade of Pale by Procul Harum](#). Unlike the Canadian case, this one applies a law very similar to US copyright law, but it does so to a very unusual and unexpected set of facts. Apparently, the [justly famous organ part](#) played at the beginning and in the middle of the song was written during studio rehearsals by a new member of the band, Matthew Fisher, who was hired to play a Hammond organ. After almost 40 years, Mr. Fisher challenged the copyright ownership in the song, claiming that he was a joint author with Gary Brooker, who originally wrote the song and has collected royalties all these years. There is a nice [summary of the case here](#).

I rather think that I disagree with the [result reach by the Court of Appeal back in April, but the decision](#) is interesting and instructive for several reasons.

First, the judgment tries to divide the attribution right (a declaration that Fisher is, indeed, a co-author) from the right to receive royalties on the song in the future or to enjoin its exploitation without Fisher's permission. This fundamental point is where the decision seems unwieldy and mistaken to me, but it is an interesting reminder of how other countries view the "moral" right of attribution, which the US does not recognize.

Second, Lord Justice Mummery (really!) does a very nice, careful job of picking apart the various threads of creativity and copyright in order to arrive at a reasonable decision about joint authorship. His decision is worth reading in order to understand the complexity of music copyright and the ways in which

copyrights in different versions can layer on top of one another. Since joint authorship is often a very important and debated issue for scholars, the careful and clear treatment of it in this case can be very useful.

Finally, there is a fascinating suggestion in the decision that “proprietary estoppel” might apply to defeat Fisher’s claim. This notion is ultimately rejected (although the same result is reached by a different route), but the discussion itself seems very significant to me. The concept being used here is very similar to “adverse possession” in the law of real property, and the effect of its application would be to give a user some real interest in a copyright if no objection has been made to the use over a long period of time. Essential, Mr. Brooker argued that his exploitation of the whole copyrighted work over forty years gave him a “constructive” right in the organ portion that Fisher could not disclaim after 40 years. I have suggested several times that something similar to adverse possession could be applied to copyright law to solve the orphan works problem, but this is the first case in which I have seen a court (albeit, not an American court) take that possibility seriously.

# OA, RNA and Wikipedia

Fri, 26 Dec 2008 08:01:27, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]

The recent [announcement made on NatureNews](#) that the journal *RNA Biology* will require authors writing for one of its sections to also post a page describing the work in Wikipedia set me wondering, and debating with a colleague, about the motivation here. Bloggers at the [Fischbowl](#) and [O'Reilly Radar](#) see this as a big step for open access, and I am initially inclined to agree. But the cynic in me has some questions. Why Wikipedia? for example. Couldn't openness be achieved just as effectively by posting OA abstracts on the journal website, as many other publications do? The answer, of course, is no, once one recognizes that the purpose is not openness for its own sake, but openness as a driver of commercial sales. Wikipedia is a first stop for many seeking information on the Internet, and it is a top hit on Google for many searches. If a large number of Wikipedia pages direct seekers of biological information to *RNA Biology*, presumably subscriptions and individual article sales will increase.

In these post-Google Books settlement days, we should not be surprised to see that limited open access is beginning to be seen as a technique to push more eyeballs onto pay-per-use sites. And as with the Google settlement agreement, I find myself very conflicted in my reaction to this trend.

It is worth noting that [RNA Biology, which is published by Landes Bioscience](#), is not an unmixed supporter of open access. Based on their copyright policies, the [SHERPA RoMEO database lists this as a "white" journal](#), meaning archiving is not formally supported. Like all of RoMEO's color categories, however, this does not adequately convey the complexity of the situation. *RNA Biology* does make its entire contents available in open access one year after publication, and it offers an "author pays" immediate OA option for a relatively low price — \$750, reduced to \$500 if the author's institution subscribes to the journal (at institutional rates that are 9x higher than individual subscriptions). Finally, *RNA Biology* acknowledges, in its copyright transfer agreement, that authors retain the right to deposit their manuscripts in PubMed Central, as required by the NIH's Public Access Policy.

All of this sounds good, but it is in that same [copyright transfer agreement](#) that one finds the policies that cause SHERPA to give this journal its lowest OA rating. The journal requires a complete transfer of copyright from its authors, and essentially gives back only two, very limited rights. Authors are allowed to use their article in subsequent publications, such as a dissertation or monograph, and are **allowed** to make photocopies of the article (not digital copies) to distribute in classes they teach (even though this could well be a fair use anyway). Notably, there is no provision for self-archiving either pre-prints or post-prints (which is why they are a RoMEO white journal), and it seems that only Landes Bioscience, not the author(s), are entitled to create derivative works from the article. That provision (or lack of provision) is, to me, the most worrisome for scholarly authors, who seldom drop a topic "cold turkey" after publishing one article.

From all this I think there is an ambiguous message to be gleaned. On the one hand, it is a good sign that publishers are beginning to see open access as a supporter of scholarly publishing rather than a competitor to it. The recent experiment by university presses in publishing traditional books alongside on-line OA versions — [James Boyle's "The Public Domain"](#) is an example — will show, I believe, that OA can increase awareness of a book or a journal and thus support sales of traditional publications. But on the other hand, if OA is structured entirely with this purpose in mind it can prove to be a detriment rather than a support to the interests of scholarship and scholarly authors. The CTA that authors for *RNA Biology* must sign suggests that this is the case here, and the Wikipedia mandate seems unlikely to



ultimately benefit the academy as a whole, although I hope to be proved wrong in that prediction. In any case, I think a close examination of all of the conditions around publication in this journal supports the continuing need for authors to negotiate and retain a right to *self*-archive, since that alone is a sure guarantee that OA will genuinely serve the interests of the author.

# What is DRM really good for?

Sat, 10 Jan 2009 14:28:41, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management, category: technologies]

As the Library of Congress [considers new exceptions](#) to the anti-circumvention rules that legally protect the DRM systems that are used by many companies to lock up digital content of all kinds, it is helpful to consider if those protections really accomplish what they were intended to.

Digital Rights Management, or electronic protection measures, are technological locks that “physically” prevent uses that are infringing, as well as many uses that would not be infringing if they were possible. The justification for using DRM is that it is necessary to prevent the widespread infringement that the digital environment enables, and thus to protect the revenues of content creators. Those revenues, it is argued, provide the incentive that keeps Americans creating more movies, music, books, etc. This purpose seemed so important in 1998 that the Digital Millennium Copyright Act included rather draconian legal protection for DRM systems, making it illegal to circumvent them even when the underlying purpose of the use would itself be legal. But the juxtaposition of two recent blog posts raises an interesting question about whether DRM really does what is claimed, and whether what is claimed is really its purpose in any case.

First is [this report from Canadian copyright professor Michael Geist](#) noting that for the third straight year sales of digital music (a prime type of content “protected” with DRM) have grown faster in Canada than they have in the United States. This growth comes in spite (?) of the fact that Canada does not have the same legal protections for DRM systems that the US does. Apparently the incentives for creativity are just as strong, or stronger, in Canada, where circumvention is not punishable, as they are in the US, where we are told that those who circumvent and those who market the technology to circumvent must be stopped lest creativity grind to a halt. The reality, as Geist points out, is that “copyright is simply not the issue,” and government intervention to drastically strengthen the copyright monopoly has not provided the promised benefit.

So why is DRM really so important to big content companies? On the [Electronic Frontier Foundation's blog, Richard Esguerra gives us a more convincing answer](#) when he notes that Apple is finally dropping DRM from the music files it sells through its iTunes store. The timing, he suggests, shows that the big content companies really use DRM to eliminate competition and enforce a captive market; as soon as that purpose becomes moot, the companies drop the DRM. It is no surprise that DRM is a marketing problem, especially for music, where it often prevents users from moving files from one device to another. As long as the expected benefits in reduced competition outweighs the loss of sales, DRM is defended as a vital part of the copyright system. But it is abandoned without a qualm once it no longer serves that anti-competitive purpose and threatens instead to hamper profits.

If DRM systems really are being used primarily to suppress competition and prevent innovation, they are working directly in opposition to the fundamental purpose of copyright law they were sold to us to support. Read together, these two reports suggest that tinkering with exceptions, as the Library of Congress is charged to do every three years, is not enough; instead, the value of the whole idea of providing legal protection to DRM should be reexamined.

# Debating Internet regulation

*Mon, 19 Jan 2009 16:40:20, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

Last week [Federal Communications Commissioner Robert McDowell](#) spoke with a small group of Duke administrators about a wide range of topics. In response to one question (which was, I have reason to know, deliberately provocative), Commissioner McDowell, who is a Duke alum, gave a pretty ringing endorsement of the unregulated Internet. He referred approvingly to the history of the Internet as an open environment that has, throughout its history, been free of government regulation.

McDowell chose to ignore, in these comments, the pre-history of the Internet as ARPANet, a creation of the Defense Department's Advanced Research Projects Agency. But really his position is the one from which I want a government regulator to start; a stance of healthy skepticism toward regulation is the best way to ensure that careful thought proceeds regulatory enactment. While suspicion of regulation is almost always a justified foundation, however, it is not necessarily the final word on the matter.

The context of the question Commissioner McDowell was answering was 'Net neutrality, and in that context it is particularly easy for the FCC to oppose regulation, since that is the position favored by the major telecoms. But it is far too simple to say that at long as the government keeps its hands off, the Internet will stay unfettered and equally accessible to all. Commissioner McDowell clearly knows this, and his assertion was that competition is the best way to prevent private entities from closing off the Internet pipes to certain types of traffic. But he also noted that the economic downturn has delayed the implementation of additional pipes, and it is still true today that the backbone of the Internet is in the hands of only a few major corporations.

The fear here is that these companies may find it desirable to implement differential pricing — charging more for certain kinds of traffic — and that regulation might be necessary to **preserve** the openness that has, so far, been a hallmark of the Internet. ISPs might, for example, decide that voice-over-internet phone services compete with another part of the business of their parent telecoms and introduce higher prices for VOIP to choke off such services. UPDATE — As [this report](#) indicates, this is a very real concern that the FCC continues to monitor

A similar decision to charge more for high-bandwidth uses could be implemented in a misguided attempt to prevent video piracy. Illegal video downloads, of course, use a lot of bandwidth, but so do perfectly legal file transfers. The danger with these kind of "solutions," whether they are differential pricing, filtering or agreements between ISPs and content companies, is that they are likely to exclude too much content and too many users. When this happens, the free speech goals which copyright is meant to serve are undermined, often in the name of copyright protection.

The recent announcement of a new anti-piracy strategy from the RIAA, and the continued behavior of YouTube toward repeat notices of copyright infringement, illustrates this danger. The RIAA has agreements with some ISPs (it is not saying who) to cut off Internet access for those accused of repeated illegal downloading. But we know that the RIAA has not been very careful about its accusations in the past, so there is a real concern that users will lose access based on inaccurate information and poorly substantiated charges. And even before the RIAA's new strategy is put in place, we know this kind of abuse is happening. Here is a [report from the ArsTechnica blog](#) about a case where what is quite likely to be fair use — the posting of film clips on YouTube to augment an online critical essay — has lead to the author having his YouTube account shut down because of DMCA notices that claim infringement but

do not have to prove it or to take into consideration any of the myriad ways the uses on YouTube might be justified. By disconnecting users after “three strikes” based on mere accusations, YouTube is already implementing the practice the RIAA is negotiating with ISPs. And we can see that that process is ripe for abuse.

The moral here is that regulation of the Internet is a complex topic. Reliance on the market alone will not always guarantee that the ‘Net will remain open and accessible on an equal basis for all. As more and more basic and vital information and services become Web-based, such access must be preserved. The trick will be to figure out the right moment and the right way to preserve access, but the time will come when those decisions must be faced, since we have already seen that reliance on market forces and good will alone will not suffice.

# Obama, (c) and the CCC

*Thu, 22 Jan 2009 08:38:03, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

As a number of media outlets reported, the [White House webpage](#) changed over to an Obama presidency before nearly any other action was taken by the new administration. In fact, the initial posts on the new blog that fronts the page were dated Jan. 20 at 12:01 pm, only one minute after the Twentieth Amendment says that the new president's term began.

From my (warped) perspective, the most interesting part of this new page is its [copyright policy](#). For one thing, it does not appear that the Bush administration had any copyright policy on its web page; at least, there was no copyright policy link on the three instantiation of WhiteHouse.gov that I looked at on the [Internet Archive's WayBack Machine](#) (yes, the Bush administration is already "waybacked."). There is a privacy and security policy linked to those pages, but nothing about copyright. The presumption is, therefore, that the White House was claiming copyright in whatever was open to protection on those sites, which probably was not much.

By contrast, the Obama White House begins its policy by noting that materials on their site that are produced by government employees as part of their official duties are not subject to copyright protection. This was true during previous administrations, of course, but it is nice to see official recognition of the fact.

Perhaps most exciting, however, is the use of a Creative Commons Attribution license for all content found on the White House page that is created by third parties, "except where otherwise noted." For the White House to employ a Creative Commons license is, I think, a wonderful affirmation of the value of the CC license as a tool and a recognition of the fact that there are more ways for creators to serve their own interests than simply to rely on "one size fits all" copyright protection. Here the White House sets an example that many in the academy ought to follow; I am very proud of the fact that the [Duke University Libraries](#) placed most of their web content under a CC license over a year ago and now the Obama administration is, presumably, emulating us.

I am much less comfortable, however, with the last paragraph of the White House policy, which asserts a unilateral right under the DMCA to terminate access for "repeat infringers." There is no indication of what kind of infringement could get one banned from the White House site, only a vague admonition to "respect the intellectual property of others." The concern is that, if the White House takes the same approach as many other site owners, mere accusations of infringement could make one a repeat infringer, and little account would be taken of the possibility of fair use. Also, no mention is made of the possibility, allowed for in [the statute \(see, especially, section 512\(g\)\)](#), that an accused infringer could dispute the accusations and have his or her comments or whatever re-posted until such time as the accuser decides to file suit.

The Obama administration, in its website and in other policy statements, has indicated a new commitment to openness and accountability. The embrace of a CC license, and campaign statements supporting fair use, offer real signs of a balanced approach to intellectual property protection. It is to be hoped that these signs point in the direction the administration will move, and that that last paragraph of the copyright policy is just obligatory and carelessly worded boilerplate.

# UCG and you

*Sun, 01 Feb 2009 07:39:49, ksmithl2@duke.edu, [category: fair-use, category: technologies, category: user-generated-content]*

A really superb article has just been released in the American Bar Association Journal called "[Copyright in the Age of YouTube](#)." Starting from the story of the dancing baby, whose 30-second home movie was the subject of a DMCA takedown notice for allegedly infringing copyright (a story I have [written about before](#)), this article does a really nice job of outlining the current issues about how copyright law addresses, or fails to address, the explosive growth of user generated content on the Internet.

Steven Seidenberg, who is described as a lawyer and freelance journalist, has done an enviable job of describing complex issues in a readable and even enjoyable way. I recommend the article for anyone interested in how the law struggles to keep up with rapid and dramatic changes in technology. The analogy between trying to police user generated content and playing "[whac-a-mole](#)" is just right. But apart from its general quality and usefulness, there are two points made in this article that I want to highlight.

First, it is fascinating to see the suggestion made by Seidenberg that the Digital Millennium Copyright Act, which was passed in 1998 and took effect in 2000, may already be out-of-date. I have often remarked about the difficulty of applying a copyright law written for the photocopier to the Internet age; Seidenberg goes a step further by noting that even the DMCA was written for a simpler set of Internet technologies — bulletin boards and Usenet groups — and may not be able to account for the huge popularity of user generated content that is now born on the Internet. Seidenberg's neat summary and comparison of two court cases dealing with UGC — the as-yet-undecided case of *Viacom v. YouTube* and a less well-publicized decision involving [Veoh Networks](#) — explains the interplay of laws and the uncertainty of results in this environment.

The second point that seems significant to me is the complaint sometimes heard about the DMCA and the ruling in the dancing baby case that it has created too great a burden on the content companies for them to have to evaluate the possibility of fair use before they send a takedown notice. Although I understand the argument that a business needs to streamline those processes that merely protect profits and do not generate them, it is hard to be too sympathetic when, in the higher education environment, we are called on to make many decisions about fair use every day, usually without recourse to a stable of lawyers. The law of fair use is intentionally, and I think correctly, open-ended and flexible; it does not lend itself to streamlined or automated processes precisely so that it can remain useful as new innovations and technologies come along. The burden of having to make individual fair use decisions is shared by users and content creators alike; it may not be efficient, but in the end the social benefit of doing things this way clearly outweighs the costs.

The last part of Seidenberg's article addresses this general point as it discusses attempts to convince Congress to shift more of the burden for copyright enforcement off of the big content companies. If they have not yet been successful in getting courts to force Internet providers like YouTube to police copyright for them, legislative efforts like the [PRO-IP act](#) to get the government more involved protecting these private rights have borne more fruit. Whether taxpayer-funded enforcement of private copyrights will ultimately squelch the growth of user generated content is an open question, and it is one that may play a huge role in defining the future for creativity and innovation.

# Sorting out exceptions

*Thu, 05 Feb 2009 08:24:31, ksmith12@duke.edu, [category: notes, category: fair-use]*

A couple of recent issues that have crossed my desk have drawn my attention to an aspect of copyright law that has the potential to be very confusing. Many people recognize that copyright works by granting a bundle of exclusive rights to a copyright holder for a limited time, then defining a long series of exceptions to those exclusive rights so that the rights holder's control is balanced with opportunities to use previous works in the creation of new intellectual content. The difficulty that often arises is in recognizing which exceptions apply to which rights and, therefore, to which situations.

Most of the copyright exceptions are exceptions to a specific right or rights within the copyright bundle. If an activity implicates other rights than the one(s) to which the exception applies, the user should not rely on that exception. The copyright bundle consists of five basic rights — reproduction, distribution, public performance, public display, and the making of derivative works. The copyright holder has the exclusive right to authorize or deny these activities UNLESS an exception applies. So let's look a couple of examples and see how the exceptions apply to certain rights in the bundle but not to others.

The face-to-face teaching exception is familiar to most teachers who want, for example, to show a film in their classrooms; it allows performances as long as the copy that is screened is legally made. This is an exception to the performance right (and display right, in the case of art slides, for instance), but not to the other rights in the copyright bundle. If the teacher want to transfer the film from VHS to DVD (thus making a copy and implicating the reproduction right), or wants to hand out those DVDs to every student (implicating the distribution right), or is making a compilation of film clips (implicating the derivative works right), the face-to-face teaching exception, by itself, will not authorize those activities. Other exceptions may apply — the format conversion and the compilation of clips are both good candidates for fair use — but it is important to recognize the limits of the face-to-face performance exception and recognize that other justifications must have to come into play.

I recently responded to a question about using an ELMO projector to project the pictures from a childrens' book for a library's reading time. Part of the "first sale" exception (section 109(c)) covers this activity nicely; it is written to allow just this kind of display of a legally obtained work. But it does not cover an almost identical inquiry about scanning the same pictures into PowerPoint for display. Why not? Because an ELMO does not make a copy of a work, while a scanner does. The 109 exception allows display but does not authorize reproduction. Again, other exceptions may allow the PowerPoint projection, but they must be exceptions that permit reproduction in addition to display.

Applying copyright exceptions requires attention to exactly which rights any given exception applies to, as well as an awareness of how certain technologies function vis-à-vis the different rights included in the copyright bundle. And most important, an awareness of the limitations inherent in each of these exceptions reminds us how important fair use is. Fair use is the only exception in our copyright law that is not limited in one way or another to specific rights; when it applies, it can provide an exception to any of the copyrights. In the ["Pretty Women" case](#) alone, fair use provided an exception to the reproduction, distribution, performance and derivative works rights. It is precisely because fair use is so flexible that it is vitally important in education; in several of the cases suggested above, where other exceptions have reached their limits, it is fair use, applied carefully and thoughtfully, which may allow the activity.

# Defending hope

*Sun, 08 Feb 2009 08:16:28, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use]*

Despite a recent appearance on CNN, [Anthony Falzone, the Executive Director of Stanford's Fair Use project](#), isn't talking much about his latest case, which is perfectly proper. Nevertheless, the case has all the necessary elements to attract a great deal of attention.

Street artist Shepard Fairey seems to admit that he used a photograph taken by an AP photographer to create his image of Barack Obama inscribed with the word "HOPE." The image became downright iconic during and immediately after the election. The work has certainly had an impact on Fairey's career, both positive and negative. Just yesterday I saw a commercial-like feature about him on the USA Network; he is, they say, "character approved." In the spot Fairey comments on the thrill of being a street artist and, as he says, doing something he is not supposed to do. [According to this story](#), the thrill caught up with Fairey on Friday when he was arrested in Boston, apparently for defacing public property, although the nature of the warrants is not clear.

As the story about his arrest notes, Fairey is also [being sued by AP over his use of the photograph](#) to create those famous Obama posters one sees everywhere. AP is asking for credit and compensation from sales of the image; Fairey is asserting fair use. Which brings me back to Anthony Falzone, who is defending Fairey in the copyright suit. Although he acknowledges that fair use is to be the defense, Falzone has otherwise said little, which is the appropriate course for a lawyer in an ongoing case.

Anthony Falzone will be talking, however, about the other high profile copyright cases he has litigated, when he speaks at Duke and at the University of North Carolina on March 2 and 3. Many of his cases involve both fair use and free speech issues, and they often either directly involve scholarship or have grave implications for scholars. Some of his previous cases have included helping James Joyce scholar Carol Schloss win agreement that her use of letters in a scholarly book was fair, in spite of objections from the Joyce estate, and successfully defending filmmaker and conservative pundit Ben Stein on fair use grounds when Yoko Ono objected to a brief clip of "Imagine" use in the film "Expelled." Perhaps Falzone's most widely-publicized case was his defense of the publisher of "The Harry Potter Lexicon" against a copyright infringement claim from JK Rowling and Universal Pictures. About all of these cases, Falzone will have much to say when he visits the Research Triangle.

Falzone's lecture at Duke is called "From James Joyce to Yoko Ono to Harry Potter: the Impact of Fair Use on Scholarship and Free Speech." It will be at 5 pm on March 2, in the Center for Interdisciplinary Engineering, Medicine, and Applied Sciences (CIEMAS) Auditorium A on West Campus. A reception will follow the talk. This promises to be an exciting and timely discussion of the role fair use plays in supporting both scholarship and the fundamental values of free expression. Hopefully many people in the Duke community will come out to hear Falzone, either on March 2 or the next day at UNC.



# Good for aging rockers, bad for the rest of us

*Fri, 13 Feb 2009 20:51:37, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

That pretty much sums up the situation regarding a proposal in the European Union to extend copyright protection in sound recordings from 50 years to 95 years. There are two important lessons to learn here — one specific and one general.

To start with some background information, we note that in the EU, as in most of the rest of the world, sound recordings are treated somewhat differently than materials under copyright. The rights in sound recordings as well as several other classes of stuff, are called “neighboring rights,” and have traditionally carried less protection than copyrights per se. This is not true in the US, where musical recordings are dealt with in the copyright act and receive the same term of protection — life of the author plus 70 years — as does other subject matter. In the EU, the copyright term is the same as that in the US, but sound recordings have had a shorter (but hardly short) term — 50 years. Now there is a proposal to almost double that term for sound recordings to 95 years.

This proposal has just been approved by the legal affairs committee of the European Parliament, and now goes for a vote to the full body. This in spite of several studies that have shown the economic harm of extending copyright this much. Every expert group that has studied the issue has advised against the move, but the pressure of industry lobbying seems to be more than the Members of the European Parliament can bear. There are stories about the recent moves [here](#) and [here](#) (from very different perspectives).

Most interesting, perhaps, is this [letter from Bernt Hugenholtz](#), one of Europe’s leading copyright experts, pointing out that this action is proceeding in the face of all the evidence suggesting it is a bad idea.

Finally, this [blog post from last month](#) includes a nice little video that offers a simple explanation, aimed at MEPs, about the economics of copyright extension. The point, of course, is that nearly everyone loses when copyright terms are extended beyond the reasonable, and very short, time necessary to provide a meaningful incentive to create.

So what are the lessons we can take away from this controversy? First, that the economics of copyright extension actually favors shorter terms, even as industry pressures for longer ones. And more generally, this affair emphasizes the point made by Prof. James Boyle in his new book [The Public Domain](#) about the great need for basing copyright decisions on actual data rather than mere assertion and self-interest. It would be nice to believe that legislators approached every issue with a eye on data and evidence, but the history of copyright regulation does not bear that out.

# From James Joyce to Harry Potter, the importance of fair use

*Thu, 19 Feb 2009 12:30:28, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]*

Anthony Falzone is Executive Director of Stanford University's Fair Use project and has defended fair use as an exception to copyright and a key "safety valve" for free expression in several high-profile cases. Anthony has argued successfully for fair use in the case of the Joyce scholar whose attempt to publish letters by Lucia Joyce was opposed by the Joyce estate and in defense of a short excerpt from the John Lennon song "Imagine" used in the Ben Stein movie "Expelled" and opposed by Yoko Ono. He also defended the Harry Potter Lexicon against an infringement claim by JK Rowling and is [currently representing the street artist who made the iconic Barack Obama HOPE poster](#).

Falzone will talk about these cases and the importance of fair use for scholars and universities in a talk at Duke on MARCH 2, 2009 in the Schiciano Auditorium (Fitzpatrick CIEMAS engineering building) at 5 pm. He will emphasize that fair use is vital in higher education not only to prevent copyright from stifling scholarship but also to support free speech and academic freedom. His lecture is entitled "From James Joyce To Harry Potter And John Lennon: The Impact Of Fair Use On Scholarship And Free Expression." A reception will follow.

This event is open to the whole Duke community, but it is especially relevant for scholars and teachers who rely on fair use to create their own scholarship or to distribute scholarly works to students and colleagues, as well as to those interested in the role of free speech in the academy.

If anyone doubts the importance of fair use for academics in all kinds of situations, this [blog post by Middlebury College professor Jason Mittell](#) offers a couple of interesting lessons. First, his reliance on fair use, and especially the transformative nature of his use of the screen captures he describes, is an important reminder of how often scholarship is dependent on fair use. As has often been noted on this site, transformative uses have gotten a lot of favor by our courts recently, which is a tremendous advantage for scholars like Mittell. But the downside is his encounter with Disney, which would not give Mittell permission for the cover art for his book unless he also paid copyright fees for all the illustrations inside, even though the latter were all very likely to be fair use.

To most of us, at least some aspects of Mittell's story seem surprising or unfair; this is precisely why Tony Falzone's lectures promise to be such an important and eye-opening event.

Falzone's lecture will be repeated at UNC Chapel Hill on March 3 at 5:30 pm in the Wilson Library. These events are jointly sponsored by UNC University Library, Duke University Libraries, UNC's Center for Media Law and Policy, and Triangle Research Libraries Network

# Presses, piracy and the slumping economy

*Fri, 27 Feb 2009 11:40:15, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

I am sorry to say that I was not surprised when I read this [article in Inside Higher Ed last week about "Pirates v. University Presses."](#) I had been blissfully unaware until recently of the existence of the kinds of websites it discusses, where unauthorized scans of the full text of many books, including academic books, are made available for free. But only a short while ago, a colleague from another institution called one such site to my attention (following the lead of the IHE article, I won't mention the site's name) and asked me what I thought about faculty linking to such sites as an alternative to using a university's e-reserves system. It did not take me long to find the full text for some of the most frequently read titles in contemporary classrooms.

I told my colleague that I would discourage faculty from linking to such sites whenever I was asked, both because they so clearly infringe copyright and because they are inherently unstable; what is there today may not be available tomorrow. I would love to see much more scholarly content available for free on the Internet, but the way to accomplish this is for faculty authors to retain their rights to post and license their own work, not to encourage these kinds of pirate sites. Unfortunately, this approach puts me once more in the position of saying no to instructors who want to take illicit advantage of the benefits of the digital realm because our out-dated approaches to copyright have not caught up with that potential.

Why should we discourage piracy of academic work? One contributor to an e-list discussion of the article asked a legitimate question — "Is it the same crime to spread knowledge by illegally making university press books available as to offer Harry Potter for download?" I am inclined to respond that it is not the same, since the interests of academic authors are more in being read than in making money; they seldom profit from academic publication, and profit is almost never the incentive that gets them to write in the first place. This is why our copyright system, and a publishing structure built on the transfer of exclusive rights, serves the academy so poorly. But authors *are* interested in controlling the texts of their writings that are available, making sure the readings they assign are stable, and getting appropriate credit for their work. For all these concerns, responsible rights negotiation and licensing, not pirate havens, are the right solution.

Moving beyond mere condemnatory hand-wringing, I am inclined to think there is a lesson to be learned in the fuss around these sites. One of the reasons faculty are tempted by such things is that libraries are increasingly unable to meet their demands for online resources, either because the resources are too expensive (either for subscription or for permission), the libraries simply cannot get permission to place materials online, or the publisher does not offer an online version of the work. The Association of Research Libraries has recently addressed these concerns about declining budgets in a [document aimed at starting a conversation with publishers](#) to preserve as much access as possible in a time when massive cancellations are inevitable. This document is a good start, but it only addresses one of the three problems listed above.

In many cases, it is the universities that are creating the digital files that students will use, because publishers have failed to do so. Several of the texts I found on the pirate site I looked at are simply not available as e-books. But libraries' ability to fill this demand is severely limited by a narrow interpretation of fair use and extremely high permission costs for digitization that exceeds that interpretation. One thing that must be understood is that the money an institution spends on

permission fees in all likelihood comes out of its collection budget. So even as those budgets are being slashed, the buying power of what remains is further reduced as permission fees go up. Education suffers, and so, in the long run, do the publishers, from whom we can buy fewer and fewer new works. Certainly the purpose of copyright law — to provide an incentive for new creativity — is left in the dust.

I wonder if there is room for a separate agreement between universities and university presses that would look more realistically at fair use for those works produced by the very faculty authors who want to make use of them and also at the cost of permission when the uses involved really are not within a reasonable understanding of fair use. The interests of both the scholars and the university presses are very different from those of J.K. Rowling or Disney or Random House; our conversations together ought not to be burdened by the perceived needs of the entertainment industries.

Why should the university publishers agree to even discuss this idea? Because library e-reserves and permission services are a bulwark against piracy, and the risk of piracy is increased when those services frequently must refuse requests made by faculty, either because they cannot obtain permission or cannot afford it. It is not that libraries would resort to intentional infringement, but that students will find what they need wherever they can, and their instructors may not be inclined to make fine distinctions about the sources of material. Academic presses also need to recognize that faculty authors feel a legitimate sense of ownership over the products of scholarly publishing, even when they have not retained legal ownership. It is simply difficult to convince some scholars that obvious academic uses of academic work are not permitted, so it may be hard to discourage all use of pirate sites unless we can provide higher education with a legal alternative that is at least as useful. This, of course, is what the music industry waited too long to do. In the long run, then, it is in the best interests of all parties to negotiate the contours of both legal ownership and legal use, and it is the presses that are likely to suffer most if we fail to do so.

# The Durham Statement

*Tue, 24 Feb 2009 08:15:35, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

I have been delighted to see the “[Durham Statement on Open Access to Legal Scholarship](#)” getting lots of attention on the blogs and e-mail lists, and I couldn’t resist adding my own comments, as much out of local pride as because I have anything to add to the discussion.

The statement grows out of a meeting here at Duke amongst the law librarians from the top dozen or so US law schools. As a call for open access, it goes well beyond most other declarations in a couple of ways.

First, the Durham Statement calls for law schools to simply stop publishing print versions of their journals. The library directors note that this is especially pressing in a time of “growing financial pressures on law school budgets,” and they are quite right. It is interesting that the issuance of this statement came only days after the Association of Research Libraries issued its own [statement about how publishers and libraries should deal with the economic emergency](#), in which a move to online only availability is also suggested.

One could argue that it is easier for law schools to suggest the transition to electronic only, open access publication because law school publishing is a unique model, where students do the editorial work and there is very little profit motive behind the publications. But it is important to realize that the incentives for publishing legal scholarship are the same as those for all other scholarly publication — reputation and impact on the field. So a model that works for legal scholars points the way toward new models that would also work for other types of scholarship. Law journals are a proof of concept that show how unnecessary the print-based subscription journal really is to the foundational values of academia.

Another point of interest in the Durham Statement is that, in spite of its call for immediate open access, it also includes a clause urging faculty authors to retain their copyrights. One might wonder why this is important if all law journal publication was online and free. The Statement calls this “a measure of redundancy,” and that is a big part of the answer. If academics retain their copyrights, they will be in a position to respond to changes in the means for distribution and use of their work. We simply do not know what will come next as technology evolves, and it is the authors themselves who will have the best incentive to adapt and respond in ways that serve their own interests. For that reason, even in an entirely open access world, authors should reserve their copyrights; the Durham Statement acknowledges this reality and suggests use of the [Association of American Law Schools model agreement between authors and journal publishers](#).

# What is “value” in publishing?

*Fri, 05 Dec 2008 07:20:33, ksmith12@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The [Scholarly Kitchen](#), a blog sponsored by the Society for Scholarly Publishing, is a source of opinion and debate that I have wanted to point out for some time. I have finally been prodded to do so, or one might better say provoked, by this post from Kent Anderson called [“Are Publishers Anti-Publishing?”](#) citing a stream of news about how various publishers are abandoning their traditional business and challenging scholarly publishers to find ways to innovate their businesses. In addition to the instances that Anderson mentions, one could note the report that the [Christian Science Monitor has decided to give up its daily print publication and move predominately on-line](#).

It is interesting to compare Anderson’s post with the [op-ed that appeared in the Sunday New York Times from author James Gleik on “Publishing Without Perishing.”](#) Both pieces challenge publishers to step up to the challenge posed by online availability. Gleik points to a return to beautiful, durable books as the best hope of traditional publishing, while Anderson clearly envisions a very different response, although his advice is less clear than Gleik’s nostalgic vision. Anderson suggests emulating Google, Facebook and Amazon, so he is clearly asking for a digital solution, not a return to producing print artifacts.

There are several points I agree with heartily in Anderson’s post, especially the call for traditional publishers to look for the value they can add to content, rather than trying to pare their offerings down to bare bones as so many newspapers have done. Yet he does not seem consistent about that point when he cites Google as one of the successful models that publishing should emulate. What value, we might ask, does Google add to content beyond easy of access? Anderson refers to Google’s “appropriation” of the “STM impact factor model,” but surely Google’s relevance-ranking algorithm is a very different thing, employed for the very different purpose of facilitating access to the content that a searcher is most likely to want. The impact factor model will not really have been “appropriated” until academic institutions start recognizing that downloads of an online work is itself a legitimate metric for evaluating the quality of the work and the career of the creator.

Which brings me to where Anderson really goes wrong — his comments about how open access and institutional repositories are “anti-publishing.” To get to this claim one must define publishing very narrowly, based on a traditional, “the way we have done it in the past,” standard; Anderson sounds a lot like Gleik at this point. On-line, open access distribution IS publishing, of course, as the many peer-reviewed open access journals clearly prove. What is most astonishing about Anderson’s discussion of these “anti-publishing” trends, however, is his claim that open access “devalues” scholarly content by “treating it as less than a commodity.” How can one make such a claim about scholarly content when authors have been expected to give their writings away for free to publishers for many years? Scholarly authors are used to thinking about the value of their work in terms other than economic, and those terms have been dictated, in part, by the business model of traditional scholarly publishing.

The value of scholarly work, for scholars, has never been based on the money it could earn, since they never saw a penny of that money and were, in fact, expected to pay for access to their own writings. Often they were even expected to pay “page charges,” which makes the author-side fees now charged by many publishers for open access seem very familiar. The point is that access and use, not economic gain, define the value of scholarly writing because they serve the scholarly authors’ need for recognition and impact; the cost of the wrapper in which the work was contained (the commodity) has never been a marker for value in the academic world, and it has lately become an impediment.

I fervently hope that scholarly publishers can find ways to add value to academic content, as Anderson challenges them to do. But that task will be much more difficult if it is based on a narrow view of the value of academic work that begins and ends with the traditional way publishers have done business. The search for new models of scholarly publishing will have to take into account the things that actually matter to academic authors and scholarly institutions.

# Don't let this happen to you.

*Tue, 27 Jan 2009 08:12:28, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation]*

I admit that what caught my eye in this story is the unique name of the band involved — Death Cab for Cutie — and the fact that I know this to be one of my twenty-year-old niece's favorite acts.

All that aside, the story is an object lesson in the problems with transferring copyright without careful consideration, and versions of this problem are occurring everyday in academia.

What happened to Death Cab for Cutie is that they posted an embedded YouTube video of themselves singing one of their own songs on their own website. Except, of course, that they do not own the rights in their own music, having transferred those rights, in one way or another, to their record label. So, [as this report indicates](#), they received a "takedown" notice alleging copyright infringement from their own label, Warner Music Group. The video is gone now, and DCFC is not able to share their own music with their fans, even though all sides must realize that doing so would increase sales.

Likewise, numerous academics have assumed that they can post their own work to personal websites, even after they have signed publication agreements. When those agreements transfer copyright, however, this assumption is likely to be wrong. There are lots of stories, unfortunately, of academic authors receiving similar "cease and desists" letters to the one the band got, where their own publishers inform them that, as the (now) owners of the copyright in the scholars' work, they do not permit the authors to post the works they wrote.

The lesson here is twofold. First, once you sign a publication agreement, it controls the distribution of rights and it is dangerous to assume you can continue to use your own work as you wish. It is important to read these agreements and to abide by their terms. Second, however, is the equally important lesson that one can negotiate the distribution of rights within these agreements. Don't wait till after the fact to read the agreement; read it before you sign and negotiate for the right to use your own work in ways you will want or need in the future.

Death Cab for Cutie probably had little flexibility in their relationship with their record label and, unfortunately, they did not learn until late in the game that they had sold their rights. For academic authors it is much more likely that, with a little forethought, similar problems can be avoided. All it takes is attention to the terms of a publication agreement and consideration of exactly what rights will be beneficial for you, as an author, to retain.



# Kindle 2, public performances and copyright

*Wed, 04 Mar 2009 11:47:24, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

I had rather hoped to stay away from the controversy being generated by the new Kindle 2 Book Reader from Amazon and its “text to speech” feature that will allow the reader to offer a computer-generated audio reading of e-books, but there are copyright issues here too good to ignore. It is hard to make sense of the claims being made in this kerfuffle, but it may be worth the effort in order to clarify what copyright does and does not protect.

In a widely-ridiculed public pronouncement, a spokesman for the Author’s Guild has [denounced the audio feature of Kindle as an infringement of copyright](#), even though the e-books sold by Amazon are, of course, licensed from the publisher. He is quoted as saying the “they,” meaning consumers, “don’t have the right to read a book out loud... That’s an audio right, which is derivative under copyright law.” This led many to trot out a parade of horrible consequences, suggesting that parents might be sued by the Author’s Guild for reading “Goodnight, Moon” to their children. So the President of the Author Guild took to the [New York Times Op-Ed page to explain that that was not their intention](#). Unfortunately, his piece does not really explain what the claim really is. He merely says that the Guild collects separate royalties for audio books and for e-books and that Kindle would “swindle” authors out of that double fee. From a copyright perspective, it is interesting to try and sort out what infringement, if any, is involved in this “swindle.”

One way to look at this, of course, is as a simple contract dispute, and contract provisions are probably the way to settle this. Authors and publishers can simply charge Amazon more for the e-book license to compensate for the potential decline in audio book sales when those e-books are “read” by Kindle. Other e-book platforms would pay a lower price if they do not provide a text-to-speech function, and both sides could monitor to see if audio book sales really do decline. For e-books already licensed to Amazon, the Author’s Guild could try to claim that this feature of Kindle 2 breaches the license terms, and try to demand additional money. The public spat is likely an attempt to force such renegotiation.

But it is more interesting to ask if any copyrights are being infringed. When a parent reads to a child, this is a private performance of a work that does not infringe any of the rights under copyright. It is very important to remember that the performance right in copyright is only an exclusive right to authorize or deny PUBLIC performances, defined as a performance “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered.” Based on this definition, it is unlikely that Kindle would ever infringe the public performance right under ordinary use.

This distinction of performances is undoubtedly why the Author’s Guild spokesman spoke of a derivative right. Now he was simply wrong to refer to an “audio right” which is “derivative under copyright law.” There is no separate “audio right,” there is only the public performance right discussed above and another exclusive right over the preparation of “derivative works.” So a lot turns on whether an audio reading of a text can be called a derivative work.

It is generally thought that a derivative work must itself be an original work of creative authorship. So a translation of an English text into Hindi involves new creative expression, as does the creation of a film from a novel; these are classic examples of derivative works, and each involves the reuse of protected expression in combination with new creative authorship. So a translator or a filmmaker must get a

license from the original author to create these works, in which there is subsequently two (at least) copyright interests. But an audio reading adds no creative expression, so it is hard to see how it is a derivative work. In [this fascinating article](#), Julian Sanchez analyzes this argument very nicely, and suggests an exception — an abridgment has been held to be a derivative work, and it does not contain original expression that is added to the original. I think there are historical reasons for this, but I will let Sanchez explain the ins and outs of this debate to those who are interested.

What I want to add to this discussion is an additional argument for why an audio reading should not be considered a derivative work. There is a long standing rule of statutory interpretation that instructs court to read laws in ways which do not make parts of the language used by legislatures irrelevant; we do not want interpretations that make whole portions of a law redundant or unnecessary, since we assume legislatures did not intend those readings. If an audio reading is interpreted as a derivative work, we would have just such a reading, because that interpretation would make the public performance right “mere surplusage.” Why would Congress include a specific right over performance, and limit that exclusive control to public performances, if ALL audio readings were derivative works and therefore subject to the authors control based on a different exclusive right. Audio readings are not derivative works because, unlike abridgments, they are subject to a different right, and we must assume that Congress intended that right (public performance) to circumscribe the control an author should have over readings of his or her work.

POSTSCRIPT — In the interval between writing this post and publishing it, the [news has come out](#) that Amazon has agreed to make changes to the Kindle. I am afraid this merely reflects on the chilling effect of a lawsuit threat; it does not change the legal analysis, which suggests that the Author’s Guild won by making a very weak claim, but making it loudly.

# A call to action

*Fri, 06 Mar 2009 08:53:49, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use]*

[Anthony Falzone from Stanford's Fair Use Project](#) gave a superb lecture on the impact of fair use on scholarship and free speech at the University of North Carolina, Chapel Hill on Tuesday. I am trying to contain my disappointment over the need to cancel his lecture at Duke scheduled for the day before due to a freak March snowstorm. I hope that I will soon be able to point Duke folks who did not get to hear Tony, as well as interested listeners from elsewhere, to a podcast of the lecture. In the meantime, I want to emphasize two aspects of Tony's talk, one from the very beginning and one from the very end (but note that the middle was fascinating too).

In setting the context for his discussion of fair use, Falzone made the fairly common point that copyright is a monopoly, which is something we usually disapprove of in the US as economically and socially inefficient and harmful. Jamie Boyle, in his [book on The Public Domain](#), discusses the reluctance felt by Jefferson and Madison over copyright for this very reason. But Falzone went a step further to stress that copyright is a monopoly **over speech**. For me this fell into the category of things I knew but had not fully considered; Tony helped me really think about what it means to give someone a monopoly over expression in a nation where free expression is the first guarantee in our Bill of Rights.

The message I came away with is that fair use is not really primarily about who has to pay whom, when and how much. Rather, fair use is a safety valve that protects one of our most fundamental values. Do we really want a copyright owner, for example, suppressing an expression of political speech such as the Barack Obama HOPE poster or the Ben Stein movie *Expelled*? From this perspective, fair use is a fundamental and absolutely necessary part of the fundamental structure of copyright in the context of American values. It is an incentive for creative expression just as much as the exclusive rights themselves are. Without fair use, I asked myself, would copyright's monopoly be unconstitutional?

At the very end of his lecture, Falzone returned to this emphasis to ask his audience to get involved. Specifically, he remind us that our practices, as librarians and academics, help shape the norms about copyright use. And courts do consider these norms within various industries and user groups as they rule on copyright matters. This is why statements of best practices are so important. Falzone ended his talk by asking us to exercise fair use, especially those transformative uses that are becoming more common in a digital age and which courts tend to favor when deciding fair use cases. These transformative uses (parody, criticism and comment, as well as all kinds of remixes and mash-ups) are precisely where new creative expression is born; they are wonderful opportunities for teaching and learning. Here more clearly than anywhere else, fair use serves both the mission of education and the fundamental purpose of copyright law to support new creation. The message is not that "anything goes," but that in higher education especially we must not allow the "[chilling effects](#)" of fear give us cold feet about creative and socially beneficial fair uses.

# Congress shall make no law

Thu, 12 Mar 2009 07:29:13, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation]

Following up on my [earlier post about Anthony Falzone's lecture](#) and his strong emphasis on the need to limit copyright to the minimum protection necessary to encourage creativity in order to avoid the harmful effects of a monopoly over speech, three related items came to my attention this week.

First, there is this [announcement of a conference](#) at Duke Law School to celebrate a new book by copyright scholar David Lange and Constitutional expert H. Jefferson Powell. The book is called "*No Law: Intellectual Property in the Image of an Absolute First Amendment*," and the tag line for the conference is "what part of 'No Law' don't you understand?" At the very least, this shows that Falzone is neither alone in his concern that copyright's monopoly can jeopardize fundamental American values, nor particularly radical in his proposed solution. Falzone focuses his work on defending fair use as a safety valve for free expression, a role the US Supreme Court has acknowledge for that exception and that many courts have upheld. For Lange and Powell, however, the concern goes much deeper, and their book proposes the much more radical re-visioning of copyright and patent protections that would be needed if we took the First Amendment seriously in the context of incentives for creativity and innovation. The question that is seldom asked, but that is beginning to rise up, is whether copyright as it is currently shaped discourages more socially valuable expression than it encourages. If the answer is that it does, and that seems like a pretty easy case to make in an age when Internet users are being sued right and left for creating their own content, it is time to take seriously proposals like that of Lange and Powell to rethink IP from the ground up.

Next up is another new book that I haven't yet seen, just read about. According to this [news release from Washington University in St. Louis](#), two economists at that fine institution have just published a book arguing that copyright and patent law are not just inefficient, but self-defeating, from an economic point of view. "From a public policy view," says author David Levine, "we'd ideally like to eliminate patent and copyright laws altogether." Apparently the book argues both that these intellectual property monopolies are harmful to society, which is becoming a fairly common point, and that there are workable alternatives to protect creators and encourage innovation. I have to admit that I will take some convincing, especially on the latter point; I tend to believe that copyright law needs pretty drastic reform, but not outright abolition. Indeed, based on the remainder of the article it appears that that is really what Boldrin and Levine are calling for, since they argue that it should be much harder to get intellectual property protection than it now is, but not that it should always be unavailable. I look forward to reading the full argument; the book is *Against Intellectual Monopoly* by Michele Boldrin and David Levine, from [Cambridge University Press](#), and the author's also maintain a blog on the topic at [www.againstmonopoly.org](http://www.againstmonopoly.org).

Finally, I want to note a pithy comment made at the end of this [blog post written by Peter Jackson](#), the chief scientist and vp at Thompson Reuters publishing. In some ways the post is a little mundane, mostly focused on the joys of e-books. But the last line caught my eye and suggested a context for these other items I have discussed. "In the future," Jackson writes, "the book is no longer a product; it's a service." I am not sure that Jackson would agree, but it seems to me that if we take this service emphasis seriously, it grows harder and harder to see why the monopoly protection of copyright is either necessary or efficient in most cases. Surely service industries flourish in a competitive market; if content is ubiquitous and "publishers," whatever they will look like in the future, offer reliable access

and convenience, those services will not depend on the artificial environment of scarcity that copyright was designed to enforce, nor will they thrive therein.

# Sailing to Byzantium

*Wed, 18 Mar 2009 09:28:20, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

I couldn't resist citing one of my favorite poems for this post about my coming trip to Istanbul, especially since I have been reading John Julius Norwich's "A Short History of Byzantium" in preparation. But most of my time recently has been spent preparing for the two presentations I will be giving next week at the second annual IP conference sponsored by eIFL in Istanbul. I have always wanted to visit Istanbul, so I am very excited about finally getting that opportunity; I am sure I will have much more to say about the city and the conference next week and thereafter. But as a preliminary reflection, I want to say something about the organization that is sponsoring the conference and comment on each of the presentations I have been preparing.

[eIFL — Electronic Information for Libraries](#) — is an organization that deserves to be better known in the library community (although by saying that all I really do is confess that I had not heard of it before). eIFL's mission is to "enable access to knowledge through libraries in developing and transition countries." To that end they have established six core programs: they negotiate access to commercially produced databases and electronic journals, they assist in building national library consortia, they facilitate interaction and sharing among knowledge professionals and they advocate on three fronts — copyright law, open access and open source software. Just reading their excellent website is an education in the role of libraries in the development of nations and cultures. I am humbled by the invitation to speak to a group of librarians involved with eIFL (and interested in copyright issues) and look forward to the chance to learn as much as I can from them over the coming week.

The first of my presentations, about the development of copyright policies for libraries, poses an interesting challenge. So much policy on this topic in US libraries is based on specific provisions in our copyright law, whether fair use, section 108 for interlibrary loan and preservation, or even something as basic as the doctrine of first sale, which allows free library lending in the first place. I cannot claim to know what those structures are or how they function in the copyright laws of all the different nations that will be represented in Istanbul. So the gist of this presentation will be to talk about the different copyright issues that arise and the different ways national law might address those issues. I can only hope to outline the decisions that have to be made as one develops a policy within the structures created by a national copyright law.

I seldom have much good to say about US copyright law in this space, but my initial conversations about this presentation have made me somewhat grateful that US law addresses many of our library issues so specifically. Even when I feel it gets the balance of rights and opportunities wrong, as I often do, at least we work within an articulated structure, which is not always the case elsewhere in the world. One irony here is that the growth of digital communications is leveling that playing field a bit, since many of the legal structures developed in the US break down when one tries to apply them to instantaneous worldwide digital access, and we are left to do our best to strike a fair balance in the absence of clearly applicable law, just as many in the rest of the world often must do.

My second presentation will be about the implications of the Google Books Settlement agreement for libraries. Preparing for this has been a real eye-opener about the international ramifications of that agreement. Although the agreement says it authorizes nothing except in the US, almost in the next sentence it adds that Google must notify the Books Rights Registry if it begins to make covered works available outside the US. So international availability is clearly contemplated. Also, many, many authors around the world are putative members of the settlement class, since they will hold US copyright

interests and/or their books will already be included in the Books Search database. It is interesting to see how different national groups have responded to being made part of the settlement. A [statement from the Pan-Africa Writers Association](#) encourages authors to register with the BRR and claim their interest, while an [article in a leading Japanese newspaper](#) denounces the arrogance of forcing authors to opt out in order to “preserve their rights.”

These divergent opinions are probably simply the result of everyone’s confusion and shock at how radically our law and our practice of access books will be changed by what is, after all, a private settlement between parties. Google books will go from being an index of the worlds knowledge to a vast commercialization of out-of-print books, changing the landscape for bookstores and libraries, as well as the legal landscape, especially around orphan works and any of the copyright exceptions (like 108) that rely on a work being commercially unavailable. Yet all of this will happen with little or no input from most of the affected parties; vast public changes will be accomplished through private negotiations. This, I believe, was a major theme at the conference held last week about the settlement agreement at Columbia Law School, and I will close by linking to two of the major reports I have read about that conference, [here](#) and [here](#). I look forward to gaining a more international perspective on this ongoing discussion from the conference participants in Istanbul, and I promise to share some of what I learn when I return.

By the way, it is somewhat ironic that I should think of the W.B. Yeats poem from which my title is taken, since I will be traveling to Istanbul, ancient Byzantium, shortly after my fiftieth birthday, and the first line of Yeats’ poem, made famous by a recent movie, is “That is no country for old men.” We shall see.

# Lessons learned in Istanbul

*Wed, 01 Apr 2009 13:36:58, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

Traveling to an exotic and chaotic city like Istanbul is inevitably an education, and visiting Aya Sofia and Topaki teaches one a great deal about the Byzantine and Ottoman empires. But the real learning for me came at the [eIFL IP conference](#) at which I was a speaker. A group of about 45 librarians from Eastern Europe, Africa and the former Soviet Union participated, and they taught me a great deal more than I could hope to have taught them. Many of these attendees were the designated IP representative for eIFL, parts of the mission of which is to advocate for balanced copyright laws around the world.

One thing I learned is that amazing work is being done by libraries all over the world in conditions, both political and material, that would discourage many from trying to provide all but the most basic library services. In Mongolia, for example, their copyright law is very new, adopted in 1992 after a period of socialist rule during which all intellectual property was considered state-owned. The transition to privately owned IP is hard to navigate, and both the law and the social structures in Mongolia have not yet reached a high level of development. Yet the Mongolian Consortium of Libraries, represented in Istanbul by Baljid Dashdeleg, is trying to contribute its share of literature to the [International Children's Digital Library](#), whose mission is to “excite and inspire the world’s children to become members of the global community — children who understand the value of tolerance and respect for diverse cultures, languages and ideas — by making the best in children’s literature available online.” The generous impulse of the Mongolian consortium to participate in this mission is hampered by both the lack of exceptions for digitization in the copyright law and the absence of usable mechanism to seek permission from publishers. But I was deeply impressed by the willingness to work hard to achieve the goal of sharing Mongolian children’s literature more widely.

Which brings me to my second point, which is to note how clearly and unselfishly many librarians around the world see the need for open access to all kinds of literature. In addition to its IP advocates, eIFL also recruits open access advocates in each country in which it works. Many of those librarians are very advanced in their ideological and practical commitments to using the Internet to achieve greater access to knowledge. I was told with great pride, for example, about the [Armenian Digital Library of Classical Literature](#) by Hasmik Galstyan, a librarian from the American University of Armenia. It is one of hundreds of examples of how the potential of the Internet can improve education all over the globe. In many ways, these librarians, and their universities, are far ahead of the US in their commitments to, and even mandates for, open access.

Nevertheless, it is impossible to ignore the fact that copyright law seldom helps, and often hampers, the educational mission of the institutions represented at the eIFL IP conference. These developing countries quite naturally look to the international treaties (primarily the Berne Convention) and organizations (the [World Intellectual Property Organization](#)) as they create their own IP laws. But it is a universally recognized truth that these international efforts have done much to harmonize copyright protection at a very high level and have ignored harmonization in regard to the limitations and exceptions that are so important for education. Thus many countries have very strong copyright protection and very weak exceptions and limitations, and libraries are left to guess at what they can do, especially vis-a-vis digitization, or to simply take the risk and plunge ahead. One African librarian told me very bluntly, but courteously, that the United States, with its zeal to export tough IP protections and disinterest in helping other countries design appropriate exceptions and limitations, was a very negative force in international IP.



There are certainly signs of hope, however. The matter of exceptions and limitations has, for the first time, been put on the agenda of the WIPO Standing Committee of Copyright and Related Rights. That sounds like a small matter, but it represents a big victory. Perhaps even more promising are the efforts to get the WIPO to see exceptions and limitations to IP protections as part and parcel of the [Development Agenda it adopted in 2007](#). That agenda recognizes, primarily in the area of patents and especially pharmaceuticals, that a level of protection appropriate for the developed countries may be stifling for those on the way up. For WIPO to recognize that these agenda requires more attention to copyright exceptions and limitations would be a giant step forward, one that eIFL is committed to realizing.

One of eIFL's most important contributions to this discussion will be the Model Law it has drafted to aid librarians as they advocate for a balance copyright law in their own countries. I was given a copy of the law "hot off the presses" while in Istanbul, and told that it would soon be posted to the [elfl web site](#). In the model law (which I read on an airplane coming home and need to look at again when I can give it my full attention) is a sensible approach to both protection and exceptions that would greatly improve the international IP environment if adopted. It should be the starting point, in spite of some reservations I will discuss in a later post, of any discussion of international copyright in the future.

# Big victory for the public domain

*Mon, 06 Apr 2009 12:38:21, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: user-generated-content]*

Sometimes big victories can happen even in small forums. On Friday a district court in Colorado — the lowest level of court in our federal system — issued a decision with big time implications. I have written several times before about the interaction of copyright law and the First Amendment protection of free speech, and in an opinion in the case of *Golan v. Holder*, Judge Lewis Babcock has ruled a portion of the Copyright Act unconstitutional because of a conflict with the guarantee of free speech.

The case involves a fairly technical challenge to a fairly technical provision of the law. The Uruguay Round Agreements Act (1994), purporting to implement agreements made about international IP protections at the World Trade Organization, restored copyright to foreign works that had already fallen into the public domain in the US because their copyright holders had failed to observe the formalities that the US required up until 1988. The result was that works that had previously been free for anyone to use suddenly were protected, and people who had used those works for years — like a community orchestra that played the music of Prokofiev — would be liable to infringement suits after a one-year grace period.

The challenge brought against the URAA claimed that taking back a work that had been free to use “altered the traditional contours of copyright protection” and therefore (based on some language from a Supreme Court decision in 2003) was subject to “ordinary First Amendment scrutiny.” This part of the claim was upheld at a higher level, by the Tenth Circuit Court of Appeals, in 2007. On Friday, the district court applied that First Amendment scrutiny and determined that the URAA was not narrowly tailored to achieve an important government interest and, therefore, was unconstitutional.

At least two aspects of this decision make it such a big deal. First, it is one of the first times a court has found an actual conflict between copyright protection and free speech. As I have argued before (repeating remarks made by Anthony Falzone, who was one of the lawyers for the plaintiffs in *Golan*), copyright, as a monopoly over expression, seems to create an obvious tension with free speech. In the past courts have said that fair use and the idea/expression dichotomy are sufficient insurance against unconstitutional suppression of speech, but now, in a fairly unusual set of circumstances, a court has found that even with those safeguards, provisions of the copyright law can go too far.

Second, this ruling makes clear that the public domain, that “commons” of material that is free for all to use and is the raw material for so much new creation, is an aspect of copyright protection itself that must be respected. If the URAA stood unchallenged, the potential for the government to revoke freedoms Americans already enjoyed in using pd expression would always exist. By affirming that the promise of the public domain is a part of the traditional contours of copyright, the court has given copyright users their first reason to cheer in a long time.

Given the importance of this case, it is certain to be appealed. As noted above, the 10th Circuit has already considered one aspect of it, so the prospects on appeal seem favorable. But the government will assuredly fight this ruling, since it will force them to rewrite a provision of the law arguably needed to conform with international agreements. There is no doubt that the law could be rewritten successfully; there are models elsewhere in the world of restored copyrights that respect the “reliance interests” of users that arose prior to restoration. As challenges proceed, however, it will be interesting to see if the argument made by plaintiffs that, in the US and because of our relatively unique First

Amendment, American law cannot ever restore any copyrights after works have passed into the public domain, regardless of treaty agreements, makes any headway.

There is a discussion of this decision [here](#), and the order from Judge Babcock is [here](#).

# One more topic from eIFL: Fair Use

*Thu, 16 Apr 2009 15:35:42, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

Because part of my assignment at the [eIFL IP conference](#) was to talk about library copyright policies, it was inevitable that we would talk some about fair use. For one thing, it is what I know about, so I invariably began a discussion of a particular library issue by talking about how it would be approached with fair use versus how you could address the same issue in a jurisdiction without an exception like fair use. Although a few countries — notably Israel and Japan — have adopted a US style fair use exception, none of the countries represented at eIFL had such a provision. So we were left to discuss just how important it is, or is not, for libraries to function.

The conference began with a presentation from Becky Hogge, who was the Executive Director of the Open Rights Group in the UK and remains a writer and commentator on technology and IP. Becky ended her presentation by pointing us to a [web site called Thru-You.com](#) where someone named Kutiman makes music mixes that are created entirely from other videos on YouTube. It is hard to describe these videos, but a lot of fun to watch them. The point to emphasize here is that these videos are another example of the flexible application of fair use, especially regarding the role of transformative reuses of copyrighted content.

With that introduction, it was interesting to hear about and discuss the relative merits of fair use for libraries. I am sympathetic to the worry that simply adopting a word-for-word version of the US section 107 will not be effective in other countries. After all, section 107 was not added to the US law until fair use already had about 100 years of development in US courts, and the accumulation of case law has continued since the 1976 act was adopted. It is hard to know how fair use will function when exported to a country that lacks that common law foundation to support the rather vague terms of the “equitable rule of reason” that we call fair use.

Many countries seem much more comfortable with the specific exceptions that make up what is often called, at least in the Commonwealth Countries, “fair dealing.” The model copyright law that eIFL has prepared for developing countries basically takes this approach, with specific exceptions for personal research, educational activities, library services, and the needs of persons with disabilities, to name only a few. All of these are tremendously important, and the advantage of having these specific exceptions is that they give a level of certainty that fair use never offers. US law, of course, has lots of specific exceptions, and I wish it included more of those suggested by the eIFL model law. Nevertheless, I still think there is an advantage to fair use. There is no other copyright exception that offers the flexibility that fair use does, especially in the face of technological change. We simply cannot know that a specific exception that works today for libraries or for researchers will still work tomorrow when the needs and services have moved to a different type of technology that may implicate an entirely different set of rights. The shift from print-based interlibrary loan to a system largely using digital copies and digital transmission, which are clearly outside of the “single-copy” parameters of the specific ILL exception in section 108, offers an example of why the decision around fair use versus specific exceptions needs to be both/and, not either/or.

For anyone interested in how fair use works, and what problems it generates, in an educational context, there is no better place to begin than with the series of blog posts by Peter Jazsi as guest blogger for the Collectanea blog at the University of Maryland University College Center for Intellectual Property, which begins with this post called [“Educational fair use: a provocation.”](#)

# Ancient texts and a modern database

*Mon, 27 Apr 2009 11:46:01, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

What could be controversial about the United Nations launching an online database of 1,200 ancient documents from around the world, the [World Digital Library](#)? Surely this is a significant contribution to making scholarship more efficient and open.

But several commentators, such as [this one from Slashdot](#), have noted that the [legal page](#) of this database appears to suggest that there is copyright to be reckoned with in these documents. As Slashdot notes, since some of these materials are over 8,000 years old, this sounds like an unprecedented claim. It seems worthwhile to take a minute and try to sort out what is being said on this page, and what might lie behind it.

First, it is worth noting that the language the UN uses about copyright is very general and indeterminate. It merely says that the country that contributed the material is the proper source for copyright information and that it is the responsibility of the user to determine what copyright issues, if any, need to be addressed. This is pretty much just “cover your (self)” language designed to permit the UN to say “we warned them” if any disputes should arise. But are there really any possible disputes?

I know of no national copyright law *per se* that could claim an interest in materials this old for any person. But that is not to say that governments themselves might not claim such an interest, perhaps under laws designed to protect “national patrimony.”

Another possibility, depending on how the UN site is structured, would be a claim under a database protection law. Although the United States pretty well rejected database protection in the Supreme Court’s [Feist v. Rural Telephone Service case](#), it is a fact in other countries. The US Supreme Court said that no copyright protection is available for “sweat of the brow,” so a database that merely compiles public domain documents or facts in an obvious and unoriginal way (like a phone book) is not entitled to protection. The *Feist* ruling would probably include a database like the World Digital Library if US law were applied. But other countries have taken measures to protect “sweat of the brow” by adopting special legislation that gives copyright-like protection to those who compile databases. The European Union’s [Directive on the Legal Protection of Databases](#) is one such law. If that law applied, and it could well apply to a dispute arising about materials from one of the EU member countries, certain uses of the material in the database would be prohibited. It is not at all clear that these database laws would prohibit isolated copying of ancient documents found therein, but they would certainly bar wholesale or systematic copying.

The area of database protection is a complex and contested one. There have been recent protests in Europe arguing that the database directive is ineffective and stifles innovation. In the US, there have been abortive attempts to introduce similar legislation, but they seem to have subsided, at least for now. Anyone who would like to know more about the nature and scope of database protection in the United States cannot do better than read [Prof. Mike Carroll’s recent blog post on the subject, “Copyright in Databases.”](#)

# Learning from ambiguity

Wed, 06 May 2009 07:33:25, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use]

I have long believed that one of the most important skills one can develop in life is the ability to tolerate ambiguity and to learn from all side of a complex and irresolvable situation. Perhaps that philosophy helps explain how I can tolerate being a copyright lawyer in the current IP environment. But I continue to have an especially ambivalent reaction to the case involving the plagiarism detection software called Turnitin. I [wrote about the district court decision](#) over a year ago. Now the appeal has been decided — a win for Turnitin on ever front, upholding the major parts of the district court ruling and [reversing only that aspect that disfavored iParadigms](#), the Turnitin parent company — and I still find myself feeling rather torn. So now I am trying to learn from the ambiguity.

The heart of the case, and the major issue [affirmed by the Fourth Circuit Court of Appeals](#), is that Turnitin makes a fair use of submitted papers when it copies and stores them to be compared with later submissions. On this issue, I have been convinced; the 4th Circuit opinion has put to rest my earlier doubts. I still don't think Turnitin is a particularly useful tool, especially for higher education, but the reasoning of the court on the fair use issue is so clear and compelling that I cannot resist their conclusion. Besides, I really wanted to agree with them on this point all along.

There are two important points that I want to emphasize in the appellate decision that really help explicate fair use. First, the Court is very clear that a work can be transformative, and so a favored candidate for fair use, even when the second work does not add anything to the original, but merely copies it for a different “function or purpose” that that for which the original was created. Here is the conclusion of the Court:

“The use of the copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.”

The Ninth Circuit has made similar rulings regarding Internet indexing in *Kelly v. Arriba Soft* and *Perfect 10 V. Amazon*, but it is nice to see this conclusion, which really broadens the scope of the transformative use analysis, arise in another circuit as well (especially in the one in which I live and work). This is a significant advance in the analysis of transformative uses over its original discussion by the Supreme Court in the “Oh Pretty Woman” case, and it offers grounds for hope that many of the innovative uses of copyrighted materials that new technology make possible could be considered transformative.

Even more exciting to me, is this remark made by the Court as it considered the second fair use factor, the nature of the original copyrighted work:

if the disputed use of the copyrighted work “is not related to its mode of expression but rather to its historical facts,” then the creative nature of the work is mitigated... the district court concluded that iParadigms’ use of the plaintiffs works “related solely to the comparative value of the works” and did not “diminish the incentive for creativity on the part of the students.”

This specific holding would benefit only a fairly limited class of uses, I think, but it is significant to me because it involves the Court’s recognition that the incentive structures for different kinds of works differ. Since the incentive structure for academic work is significantly different from that of commercial

production, I would argue, the scope of transformative fair use for academic work should be broader than it might be for Disney films or songs by U2. The reasoning of the Fourth Circuit here, its willingness to ask how this specific use impacts the incentive for these specific authors, takes a step toward that kind of argument.

In general this decision is a very comprehensive and cogent fair use analysis that deserves to be widely read. So why am I still feeling ambivalent? Because the Court never did address the issue that troubled me most in the lower court's ruling, the assertion that the "click-wrap" license that the plaintiffs had to agree to in order to get access to the site was valid and enforceable, even though the plaintiffs were minors and took steps to indicate that they did not agree to the non-negotiable terms. The appellate ruling, based as it was on fair use, never needed to address this holding, but I continue to think it was a mistake. The fact that courts will give such weight to contracts that users can neither negotiate nor avoid suggests to me that this is a problem in need of a legislative solution. I would like to see the copyright law amended to state that non-negotiable contracts do not preempt copyright law; that is, that consumers cannot give away their statutory rights as users of copyrighted content unless they have a meaningful chance to do so intentionally and with forethought. If we could add such a provision to the federal law, my ambivalence about the Turnitin case would vanish altogether.

# A flurry of activity

*Thu, 30 Apr 2009 07:59:07, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

There has been a sudden burst of activity in the Google Books case and the process of arriving at a settlement of the copyright infringement claim brought against Google by a group of authors and a publishers trade group. Last week [Publishers Weekly reported](#) that Judge Chin, who is hearing the lawsuit, rejected a motion to allow the Internet Archive to intervene in the case, which would have meant that IA would become an official party to the litigation. As PW says, “The IA wants to remove orphan works from the settlement and limited the settlement to rightsholders who have filed a claim.” With the denial of their motion to intervene, IA will have to look for another way to attain this end. More on that in a minute.

This week, two quite surprising developments have been reported (and really, the denial of IA’s motion was not very surprising). First, Judge Chin has [decided to delay the deadline](#) for authors to opt-out of the settlement class by four months (until September 4), with a parallel delay in the final hearing to approve or reject the settlement (until October 7). It seems [Google had asked for a shorter delay](#) in the deadline, and all parties seem to have been surprised by this ruling. But maybe it is not so surprising in light of [this article in yesterday’s New York Times reporting](#) that the Justice Department has decided to begin an inquiry into whether the settlement agreement poses an anti-trust problem. It is hardly a novel thought that there might be an anti-trust concern in the proposed monopoly over digitized books that would be created by the Google settlement, but it is, perhaps, unusual for the Justice Department to take notice of those concerns so quickly and to act before there is a final hearing on the settlement. Perhaps it was notice of that decision from Justice that prompted Judge Chin to delay the deadline and hearings.

So with this extra time, what should the concerned parties be doing? Specifically, is it possible to get the judge to limit the settlement to the parties in the litigation and to exclude orphan works? This [long blog post by Professor Pamela Samuelson about the settlement](#) suggests that there is another option, an objection by members of the putative class to the very certification of that class. As Samuelson points out, there has not yet been any hearing on whether or not the class in this class action suit really represents all of the authors who would be members of it, and with the settlement, there is not likely to be such a hearing. Google, as the defendant in the suit, would usually challenge a class certification and force the court to decide that the plaintiffs before him really do represent the rights and interests of all of the proposed class members. But with the settlement, Google has a huge financial incentive to support the class certification rather than oppose it — only through class certification will they get the compulsory license to digitize orphan works that is really at the heart of this settlement.

It is hard to believe that the Authors Guild really does represent the interests of the millions of rights holders in orphan works who, by definition, are not exercising those rights and who will not gain from the settlement. To include orphan works in the settlement is a shortcut to a lucrative business model, not a genuine effort to protect rightsholders, and it will likely derail legislative efforts to address the orphan works problem in a comprehensive way. It should be noted that even though the settlement is technically non-exclusive, no one else who undertakes a digitization project in the future will be able to get such a compulsory license for orphan works, since it depends on an extremely expensive and difficult manipulation of a very quirky aspect of US law, the class action mechanism. So if the Internet Archive really wants to exclude orphan works from the settlement, their best move would be to assist



copyright holders who are members of the putative class to file an objection to certification and try to force a full hearing on the issue of representation.

If a class was ultimately not certified, the settlement would apply only to the parties in the litigation, and one has to believe that those parties would not be interested in settling unless they could get the immense commercial advantage that a class settlement would provide. The final result might be that the fair use issue with which the case began would actually go to trial. And that, I think, would not be a bad thing.

# Click-wrap and illusory promises

*Tue, 12 May 2009 15:13:37, ksmithl2@duke.edu, [category: licensing, category: technologies]*

At the end of my last post I returned to a frequent theme, the unfairness of “clickwrap” licenses and the fear that they are over-enforced by courts, in spite of the inability of users to negotiate the terms or avoid enforcement of these one-sided deals.

So I was rather pleased to find an exception — actually a series of exceptions— to this over-enforcement in a [recent case out of the federal district court in the northern district of Texas](#). While this line of cases does not accomplish what I have wished for, a ruling that copyright law and its exceptions should preempt non-negotiable contracts, they do show that, in some circumstances, courts will reject a clickwrap agreement when the seller takes too much advantage of its powerful position.

Cathryn Harris agreed to a clickwrap license when she signed up for a particular online program run by Blockbuster. Such licenses, of course, condition service or access on agreeing to a set of terms that is wholly non-negotiable; all the user can do is click “I Accept” or forgo the service entirely. I have complained about enforcement of a similar licenses in the Turnitin case by a court in Virginia, where the students were compelled by their school to sign up with Turnitin. In this case, when a dispute arose and Ms. Harris filed suit against Blockbuster, the company tried to enforce the clause in the clickwrap licenses that sends all disputes to arbitration (which is much less expensive). Ms. Harris opposed the motion to compel arbitration, and the Texas court sided with her, ruling that the entire agreement, including the arbitration provision, was invalid.

The reason the court rejected the license was that it contained a provision saying the Blockbuster could change the terms of the agreement at any time, without notice. Such provisions are not uncommon in clickwrap licenses, because the nature of the agreement makes it impossible for the seller to contact everyone who agrees to the terms of use. But here the court said that such a clause makes the contract “illusory.” Contracts, after all, are an exchange of promises, and a one-sided, “we can change the terms anytime” clause really means that the side that drafted the agreement has not made any promise at all that it is bound to stick to. When an apparent promise really is just statement of discretion — “I will pay you \$20 to wash my car if I decide it was worth it” — courts call those contracts illusory because there is no real exchange of promises.

As [this analysis of the case](#) shows, there have been several cases in which such clauses allowing one-sided changes have caused a clickwrap agreement to be found illusory. It is interesting that they are all about arbitration. I suspect this is because arbitration is something that must be based on mutual agreement, and courts are reluctant to limit a person’s access to the legal system based on a promise they could not undertake voluntarily.

For the purposes of our concerns here, this case is a small indication that clickwrap licenses must be drafted carefully, and that the fact that users seldom read such agreements is not an excuse to overreach too far. When the issue is important enough, a court will occasionally void a one-sided agreement rather than enforce terms that put one party at too great a disadvantage. Perhaps we will soon see such a willingness to reexamine clickwrap agreements when the disadvantage caused is a loss of those user rights that Congress so clearly intended when it drafted the copyright law.

# How fair use was born

Thu, 21 May 2009 07:31:42, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

The history of copyright law is a fascinating study. Really, it is. One truism about that history is that copyright protection (as a body of law distinct from the earlier privileges granted to printers) arose at the same time that romantic ideals of original authorship did. The continued influence of that romantic, and highly fictionalized, view of authorship is evident in the ill-informed and self-serving comments of author Mark Halpern in [this Wall Street Journal op-ed](#) and in the new book he is flogging. But I was reminded, by [this blog post criticizing Halpern from Copypense](#), of an article that really deepens and complicates the history of authorship, originality and copyright. In "[The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright](#)," Oren Bracha argues that the romantic ideal of authorship was in a continuous tension with market forces and social values from the inception of the law and throughout its development in the US. He mines this tension for rich veins of insight into the nature of originality, the "work" that copyright protects and the rules about who should own the rights created by copyright law. It is in the context of his discussion of how the protected work was defined that I found a fascinating perspective on the origin of fair use.

It is hard to believe that in the mid-19th century a copyright holder did not have the right to authorize an abridgment or translation of a book, or to object to such unauthorized efforts. Yet in 1847 Justice McLean held, in *Story v. Holcombe*, that an abridgment did not infringe the rights held in the original, even though he admitted that it was a market substitute for that original. Six years later, Justice Grier found that a German translation of Uncle Tom's Cabin was not an infringement of Harriet Beecher Stowe's rights in her original novel (*Stowe v. Thomas*, 1853). Both an abridgment and a translation are clearly derivative works under today's law, the exclusive rights to which are reserved to the copyright holder (see [our last post](#) about a translation law suit in Argentina). So what were these justices thinking? As Bracha points out, there was a shift in progress from looking primarily at the new work's "usefulness to the reading audience" to primarily protecting the market value of the original in all its potential forms. These two cases are on the trailing edge of that shift; the last gasps of the older notion of allowing free adaptations when there was a clear social benefit.

The remarkable point, to me, is that the development of fair use occurred within this same transition. As Bracha sees it, fair use was "a vehicle for the radical enlargement of the scope of copyright." Throughout the middle of the nineteenth century, the scope of copyright was dramatically expanding from a limited "printers" right to prevent near-verbatim reproductions to a full-blown notion of ownership over an "abstract intellectual essence" that could find express in a myriad of forms, all of which were under the control of the author. Fair use, created by the same judges who were overseeing this expansion, became a substitute for all of the socially beneficial uses that were previously outside the scope of copyright. Fair use is the *bête noir* of rights holders and copyright maximalist, yet Bracha argues effectively that it really developed in order to make judges more comfortable with a vast expansion of copyright's scope, precisely to provide an economic windfall to rights holders.

Bracha offers a nice summation of the tension between economic protectionism and a social ideal of broad dissemination of knowledge and information that is, he says "inherently built into a modern copyright system." As he phrases it, such a system "creates private exclusion power over information in the name of maximizing the free dissemination of information." Would we actually be better off, to ask a radical question, if rights holders did not have control over translations, as they did not in 1853? Perhaps the students of that Argentinian professor that I wrote about last week would be. And it does

not seem that fair use would do those students or their professor any good at all, even if they were in the US. It is hard to imagine a US judge today finding that fair use would permit an unauthorized translation even in a situation where no commercial translation was available. So the addition I would make to Bracha's fascinating history is this observation: the massive expansion of copyright's scope and its term of protection has forced fair use to do work it was never intended to do, and it is no longer an adequate safeguard of social interests; perhaps, instead of comforting ourselves with the fiction that fair use is good enough, we need to go back and look critically at the scope of copyright itself.

# Enforcing scarcity

*Fri, 15 May 2009 09:17:45, ksmithl2@duke.edu, [category: copyright-in-the-classroom]*

For those in academia who take comfort in the comparative dearth of copyright infringement lawsuits against professors, this news out of Argentina will come as a rude awakening. Just as we have gotten used to the idea of academic presses suing academic institutions, as in the Georgia State University case, now we have a [professor being charged with infringement in a criminal case](#) (which is not really unusual in South American copyright suits).

So what did Professor Horacio Potel do? He made Spanish language translations of some 20th century classic works in philosophy (Heidegger, Derrida and Nietzsche) available to his students. He asserts that such versions simply are not available for purchase to his students.

Unfortunately for Professor Potel, lack of availability is not really a defense against copyright infringement. In a country with a fair use provision (US, Japan, Israel), such unavailability might help with the forth fair use factor, the impact (or lack thereof) on markets for the original. Rights holders, however, often point out that this factor includes potential markets, and assert that it should be their option whether and when to exploit a particular market. Thus the answer to Professor Potel's dilemma from those who hold the rights in these works is basically that his students are out of luck. For those following the [debate about whether copyright laws do more harm than good at The Economist](#), this instance where copyright is being used to enforce the **unavailability** of educational resource ought to weigh heavily on the harm side of the balance. (By the way, the voting on the motion showed 71% agreeing that the law did do more harm than good, while 29% felt it was more beneficial).

It is worth noting, while looking at an international infringement case, that the principle international treaty on copyright law, the [Berne Convention for the Protection of Literary and Artistic Works](#), does not contain the same broad exclusive right for "derivative works" that is found in US law. This is probably a good thing, since it is sometimes very difficult to define exactly what is a protected derivative work. Leaving that definition up to individual countries seems like a good idea, but it really won't help Professor Potel. The Berne Convention does mandate that its members protect two specific derivatives — translations, in article 8 (sorry, Professor) and cinematic adaptations in article 14. I have little doubt that Argentinian law includes those exclusive rights, so Prof. Potel must, I fear, base his defense on social utility and lack of market harm, two claims that don't seem to carry much weight these days.

# What has changed

*Wed, 27 May 2009 11:08:08, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management, category: fair-use, category: technologies]*

Courts in the U.S. have asserted for years that our copyright law is compatible with the First Amendment guarantee of free speech by citing to principles — fair use and the rule that copyright protects only expression and leaves the underlying ideas free for all to appropriate, reuse and build upon. Both of these safeguards are still in place, yet I have twice claimed in this space that we need to look again at the relationship between copyright and free expression. So the question presents itself, do I just not get it, as [at least one commenter seems to think](#), or has something changed to make reliance on fair use and idea/expression inadequate these days?

Although I am not convinced that the two principles usually cited were ever adequate, especially as the scope of copyright's monopoly expanded, what has clearly changed, in recent years, is that Congress adopted the Digital Millennium Copyright Act in 1998. The DMCA added two provisions to the copyright act that have had a negative impact on free expression.

First were the legal protections provided for technological protection measures, or DRM (digital rights management) systems. It is ironic that content owners decided to move toward technological locks because they felt that legal protections were inadequate, and then found they needed legal protection for those locks when they proved insecure. But the combination of digital locks and “anti-circumvention” rules has been devastating for free speech; even use of public domain works can now be locked up, and the law will prevent access.

Lest we forget the power of DRM, here is a [note about the Motion Picture Association of America “reminding” a court](#) that it is illegal to circumvent DRM systems even for a use of the material that would be perfectly legal. So when digital locks are used, one of the safeguards our courts have relied on to preserve free speech — fair use — is apparently useless. As the EFF attorney mentioned in a blog post linked above says, it is by no means certain that fair use is entirely trumped by DRM, but there is a case that held that, and the content owners certainly believe that fair use is now obsolete.

An extensive study done by Patricia Akester, a researcher with the Centre for Intellectual Property and Information Law at Cambridge University, lends weight to that argument that what she calls “privileged uses” (like fair dealing in the UK and fair use in the US) are adversely impacted by DRM systems. There is a [report of her study here](#), and the full text (over 200 pages!) is [here](#). Akester may have done the first empirical study of these adverse effects, and her conclusions are sufficiently gloomy to lead her to suggest a legislative solution. She proposes that a “DRM Deposit System” be established where content owners are required to deposit either the key to their lock or an unencrypted copy of the work. Then a user could make an argument or meet a set of requirements for access when their proposed use was clearly within a privilege. If the content owner declined to deposit with the system, circumvention for access for privilege uses would be allowed. Some such system, similar to the “reverse notice and takedown” proposal discussed here over a year ago, is clearly needed if fair use is to continue to function as a safeguard of free speech.

The other provision of the DMCA that imperils free expression is the notice and takedown procedure itself, which was created to protect Internet service providers (ISPs) from liability for infringing activity that happened over their networks. In one sense, this “safe harbor” has been good for fair use, allowing the creation of user generated content sites like Flickr and YouTube where lots of fair use

experimentation can take place. But that take down procedure is being abused, with bogus notices being sent to prevent legitimate and even socially necessary criticism and parody. ISPs are quick to takedown sites that are named in these takedown notices, and the process for getting them restored subjects the original poster to an increased risk of liability. It is very costly, after all, to defend free speech even against a bogus claim. So abusive takedown notices have now become a favored way to suppress criticism and comment that is unpopular with a major company or content owner. The long tradition of “I Hate BigCo, Inc., and here is why” web site, which courts have often held to be fair use of copyrighted and trademarked content, is now much riskier than it was before. In fact, the Electronic Frontier Foundation has even created these [six steps to safeguard a gripe or parody site](#), recognizing that free speech is not longer sufficiently protected by traditional provisions within the copyright law alone.

# New (and not so new) resources

*Tue, 02 Jun 2009 05:35:36, ksmithl2@duke.edu, [category: notes, category: copyright-issues-and-legislation, category: fair-use, category: user-generated-content]*

I am delighted to be able to link to a whole new group of resource for understanding and teaching others about copyright law and user rights. Since most of these resources are video, they offer a nice supplement to the text resources I have listed [here](#) and [here](#).

First, because it is the most general, is this new [web site called "Teaching Copyright"](#) from the Electronic Frontier Foundation. This is a full-scale online curriculum designed to teach students about copyright, It is intentionally offered to counter some of the educational efforts of the music and movie industries, which tend to focus heavily on what is not allow and try to avoid mentioning fair use or other exceptions that benefit users and support new creativity.

Second is what I like to call the most boring seven minutes on YouTube. I realize that there is great competition for that honor, but this video in which I discuss the [copyright and privacy issues](#) involved in recording campus lectures and classes for Internet distribution surely has a claim. It was made at the request of the Duke Office of News and Communications, and I have reason to hope it is helpful, even if it is not exciting. If viewers are seeking entertainment after listening to me drone through the rights issues they need to consider, it is worth while looking around at the other videos on the [Duke Libraries YouTube channel](#); many are much more exciting.

Next is this video from JISC on [Intellectual Property Rights in Web 2.0 world](#). It is a cute, colorful and nicely detailed discussion of rights and permissions issues that need to be considered as one creates new content for the web, and it points to an "online diagnostic tool" that will walk one through the issues in greater detail. One warning, however, is that because this video and diagnostic tool are created in reference to UK law, where there is no fair use provision, their suggestions for when permission is needed must be reconsidered by US citizen in the light of our fair use provision. Nevertheless, this is a helpful way of evaluating the issues and the various strands of rights that have to be considered, even if the conclusions will seem too strict to Americans.

The antidote to JISC's lack of reference to fair use is this final video from the Center for Social Media on [Fair Use and Online Video](#). The Center has been a great champion of fair use through its work to create best practices documents to guide filmmakers and teachers of media literacy. Now this video, and the accompanying best practices that it refers to, make the process of figuring out how and when fair use applies to allow a use without permission from the rights holder both clearer and rather entertaining. This, and all of the resources mentioned above, are additional tools for the ongoing effort to clarify copyright for our students, staff and faculty; it is nice to be able to point to such an array of different, and amusing, media



# Peer review and open access

*Fri, 12 Jun 2009 07:53:55, ksmith12@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Several different events have focused my attention recently on the relationship between open access initiatives and peer review. First, a new [task force on “digital futures”](#) at Duke met for the first time yesterday, and it became clear very quickly that this group sees an open access initiative as its first task. The group, which was appointed by the Provost and is predominantly made up of faculty, will evaluate various options and recommend a policy or policies to the Provost and the Academic Council. The discussion at the task force’s first meeting made in very plain that open access was an important value to the group, but also that the apprehensions and misapprehensions about how open access is related to peer review and traditional promotion and tenure processes would be a major focus for conversation and education.

Next, I ran across [this blog post by T. Scott Plutchak](#), the Director of the Health Sciences Library at the University of Alabama at Birmingham, about peer review and the NIH Public Access mandate. I certainly do not agree with everything Plutchak says here. He often seems to treat copyright as a publishers’ right rather than a right that vests with an author at the moment of creation, and that error creates a significant confusion when he mentions, and rejects, the argument that “the publisher has the right to refuse to grant the license.” Of course, it is the author, as the original copyright holder, who grants a license to NIH as a condition of funding. The publisher merely decides whether or not to accept an article and the transfer of a copyright that is subject to that prior license. But Plutchak is quite right to raise the issue of peer-review and to note that the NIH clearly values such review and is gaining a benefit from a process that is managed by publishers.

That concern leads me to the article I really want to point to with this post, [“Publish and Cherish with Non-proprietary Peer Review Systems” by Leo Waaijers](#). Waaijers raises the same point that worries Plutchak and says quite bluntly, in the context of the multiple open access mandates from funding agencies that sponsor research in the European Community, that such mandates are unfair to a large number of authors because they are forced to negotiate copyrights with a variety of publishers, and most cannot publish in fully open access journals. Most of the others must transfer copyright in order to gain the obvious advantage of the peer-review system managed by commercial publishers. Waaijers’ solution to this unfairness is striking; it is simply that funding agencies should contract directly with publishers to create “non-proprietary” peer review systems. By this he means systems that can accomplish independent peer review without insisting on a transfer of copyright; such systems would allow far more authors to make their work available directly in open access form without jeopardizing their promotion and tenure processes.

This suggestion clearly requires a lot of thought. But two interesting things seem to stem from such a idea. First, by separating peer-review from the process of proprietary publication, it would create an on-going role for some publishers even when and if their current business models become unsustainable. Waaijers’ suggestion would ask existing publishers to submit proposals to the funding agencies to run these peer review systems, which would be independent of their other publication activities, thus taking advantage of developed expertise without continuing to tie that expertise to a specific model of scholarly communication. Second, by examining the bids created in respond to a funder’s tender or request for proposals, the scholarly community would gain much better insight into what it actually costs to run a peer review system, which is, after all, the part of the current model of scholarly

publication that is most important to scholarly authors and that we must take care to preserve in some form.

# Fair use, by comparison

*Wed, 17 Jun 2009 08:14:01, ksmithl2@duke.edu, [category: fair-use]*

Fair use is a uniquely American concept, in spite of its recent inclusion in the national copyright laws of Japan and Israel. In the US, after all, it is a common law doctrine that was developed by judges, intent on mitigating the most unfair applications of the copyright monopoly, for over 120 years before it was adopted in almost the exact terms in which it had been articulated by those judges, into section 107 of the 1976 Copyright Act.

When I spoke to the eIFL IP conference back in March, this history of fair use was in my mind as we discussed the flexibility that fair use offers versus the certainty offered by more specific exceptions for research and teaching found in the copyright laws of most other countries. I blogged about [those reflections](#) a couple of months ago, and also [wrote recently about the history of fair use](#) in the US.

Now I have just finished reading an article by Duke Law Professor Jerome Reichman and Professor Ruth Okediji of the University of Minnesota Law School that has renewed and deepened these comparative reflections about fair use and international copyright law. The paper, "[Empowering Digitally Integrated Scientific Research: The Pivotal Role of Copyright Law's Limitations and Exceptions](#)," is a sweeping discussion of the potential inhibition of science and international development caused by copyright law's "one-way ratchet" in international fora, by which levels of protection keep getting increased while limitations and exceptions have been, until recently, largely ignored. But I want to focus briefly on a small part of the discussion by Reichman and Okediji about the relationship of fair use to limitations and exceptions in the rest of the world.

The point I want to emphasize is fairly simple (probably because I have not fully digested the article yet). It is simply that fair use and the "three-step test" used to evaluate limitations and exceptions under international agreements have something to teach each other. The three step test, found in the [Berne Convention](#) in article 9.2 and in several other places in international IP agreements, says that limitations and exceptions adopted into national copyright laws should apply to "certain special cases," not "conflict with normal exploitation" of a work, and not "unreasonably prejudice the legitimate interests" of a rights holder. There has been a great deal of debate about how to interpret these terms and how to apply this test; the major content industries have latched onto its language to suggest that only the narrowest of exceptions can pass muster.

Reichman and Okediji suggest that the interpretation of the three-step test should proceed more in the way fair use is interpreted, as an equitable balancing test where there is no "score keeping" of the factors, nor must each factor favor the same side of a debate. Instead, they argue, quoting the Max Planck Institute's declaration on the subject, courts should weigh these three steps in light of the circumstances and the normative values that IP law tries to embody. In short, they see the three-step test as an "equitable rule of reason," as fair use has been called for years.

On the other hand, Reichman and Okediji also find a lesson for fair use in an examination of the three-step test. One reason judges are sometimes reluctant to apply fair use in a given situation is that it is an "all or nothing" proposition. If a work is fair use, the rights holder is not entitled to any compensation for the use. As the authors see the three-step test, it suggests the lesson that sometimes a use may serve the public good to such a degree that, in the circumstances, no compensation is called for. But they also recognize that there may be situations where the use should be allowed, but equitable compensation paid to the rights holder. They suggest that situations in which the use serves a

normative public good but also generates revenue, a rights holder could deserve compensation from those revenues. Thus fair use would become a mechanism for imposing, in some circumstances, a compulsory license for a particular use rather than a free pass.

This is a fascinating suggestion, and one wonders whether judges could, or would, make this change to fair use without statutory amendment. Congress specifically said, when it incorporated fair use into the law, that that doctrine was left free for further interpretation. In any case, this is only one of a compelling series of points that Reichman and Okediji make about the relationship between copyright law and the progress of science around the world.

# Words having meanings, but money talks.

*Tue, 23 Jun 2009 08:37:36, ksmith12@duke.edu, [category: copyright-issues-and-legislation]*

The overheated rhetoric employed by the big content industries in their futile and probably suicidal battle against file sharing has been very detrimental to any hope for an improved understanding of copyright and intellectual property. For example, in an age when real piracy has once again become an international concern, the use of term “piracy” for file sharing seems both inaccurate and offensively self-centered. In a [recent article in Information Today](#), K. Matthew Dames does a effective job of deconstructing this use of “piracy” and explaining why it really does matter what language we use to frame the problem of copyright infringement.

There is some irony in Dames’ article, however, in his use of “theft” as an alternative to “piracy,” as when he asks “should “piracy” continue to be used to mean theft of works that are protected by copyright or other forms of intellectual property (IP)?” Black’s Law Dictionary, following a long common law tradition, defines theft as “the felonious taking and removing of another’s personal property with the intent of depriving the true owner of it.” This definition indicates why theft is also a poor word to use to frame the problem of infringement. The characteristic of intellectual property that it can be shared without depriving the original owner of it, and that its value, in fact, depends on this ability to share copies, explains why legislators have always distinguished infringement from theft. To infringe does not mean to “remove” the IP but to copy it. Nor is there an intention to deprive the owner of the property, merely some of its value. Since theft is a “specific intent” crime, IP is not treated as personal property (chattels) under the law, but in a conceptually different category which can be infringed but not stolen.

Why do these fine legal distinctions matter? In my opinion, the greatest harm done by the rhetoric of piracy and theft is that it seems so absurd to many people that they discount the seriousness of infringement. The ubiquity of file sharing today seems to prove this point. By overreaching in their rhetoric, the content industries encourage many people not to take them seriously. But infringement is a serious matter; it deprives someone of their rights, if not their property, and that is a matter the law should take seriously. The rhetoric of theft and piracy makes it too easy to laugh and scoff instead.

Nevertheless, the exaggerated language and claims of the content industries do have some effect. For one thing, they can influence juries to get swept up in the overheated atmosphere created by talk of piracy and theft. How else can one explain the [verdict in the second trial of Jammie Thomas-Rasset](#)? When her first trial for downloading 24 songs without authorization ending in a judgment of \$222,000 in damages, or \$9,250 per song, the judge himself called that amount “unprecedented and oppressive.” Now the second jury has assessed damages of \$80,000 per song (although there seems to be no chance of collecting that money and indications that the RIAA will not try). It is easy to conclude that the same rhetoric that seems so silly and inapt as part of an “education” campaign is very effective in the hothouse atmosphere of a courtroom; perhaps, indeed, that has been the point all along. In any case, we will certainly hear a great deal more from the content industries trumpeting this victory and trying to deter even legal sharing with the threat of ridiculous damage awards.

In the meanwhile, Fred von Lohman of the Electronic Frontier Foundation [raises the interesting question of whether this award of damages is constitutional](#). The Supreme Court has struck down punitive damage awards in the past when they were considered so out of line with actual damages that they violated due process, and in the Thomas case the actual damages were less than \$25. So an award of almost 2 million is certainly out of line. The problem is that statutory damages are different from

punitive damages in an important way — they are written into a statute. Excessive punitive damages have been found to violate due process because they are unforeseeable; a defendant in a relatively small case cannot imagine that they could find themselves liable for millions, and the decision to create such liability is made solely by a jury in the specific case. The Court has found that reasonable foreseeability is a limit on a jury's discretion in such situations. In an infringement case, however, the range of damages is specified in the law, and a potential defendant should know the consequences prior to undertaking infringing activity. There is not, in short, the same kind of due process problem in copyright cases.

This is one reason why I do not expect the award in the Thomas case to be challenged on Constitutional grounds. The other reason is that the RIAA has already signaled that it is willing to settle for much less money; it wants to advertise the judgment but not appear like an ogre trying to squeeze blood from a turnip. Perhaps the best reason for the RIAA not to try to collect here, however, is that it does not want to see either a court challenge to the Constitutionality of the statutory damages provision of the copyright law OR a legislative awakening to the obvious fact that these damages have gotten out of hand and should be reduced as a matter of good law and common sense.

# Openness and academic values

*Fri, 26 Jun 2009 08:54:05, ksmith12@duke.edu, [category: authors-rights, category: copyright-in-the-classroom, category: open-access-and-institutional-repositories]*

An interesting controversy arose recently at San Jose State University, when a professor objected to the fact that one of his students posted source code he had written as part of some class assignments onto the web. Amazingly, the professor claimed that sharing this code was tantamount to plagiarism, since it made the student's work available for others to copy, and might be copyright infringement. This latter claim seems to have been based on the professor's belief that, as the author of the assignment, he had a copyright interest in the work of the student. There is a report and comment about this case from [Ars Technica here](#), and one from [Inside Higher Ed here](#). The University's Judicial Affairs office did not comment on the copyright claim, but it did determine that the student had not violated the academic integrity policy and could not be prohibited from posting his own work. There are lots of opportunities here to elucidate copyright issues and ponder the important values of academia.

As far as the copyright issue is concerned, it seems pretty clear that the professor does not really have a claim here, at least not if all he did was to pose a problem for his students to solve. Ideas, we must recall, are not protected by copyright, only expression is. Computer code is protected by copyright from the moment it is fixed; the Copyright Office considers software a "literary work." That protection is vested in the author, and no interest is owned by a person who merely set the parameters of the work or suggested ideas which might be used. Patents, which are also available for software, do protect ideas, and perhaps the SJSU professor is confusing the two very different kinds of protection (although there is no indication that anyone has sought a patent). Unlike a patent, there is no need to apply for copyright protection. That protection is owned by the author of the expression.

Which brings me to the most important reminder to be taken from this case. It is that students own the copyrights in the works they create at our institutions. As the digital age offers new opportunities to disseminate scholarship, including student scholarship, we need to remember that students own their copyrights (just as professors own theirs) and formulate appropriate policy to respect those rights and facilitate use and sharing as needed.

On the plagiarism charge, I think it is clear that SJSU was correct to affirm the ability of students to share their work. If open access sharing is thought to be a problem because of the mere potential for plagiarism, all publication would pose a similar threat. And especially in the area of computer science, where open source code is a common norm, it is important for students to learn the value of sharing in terms of the ability of a community to review and improve a scholar's work, and to develop judgment about when a particular work is ready to be shared.

There are many reasons to share scholarship, and very few reasons to keep it secret. Scholarship that is not shared has very little value, and the default position for scholars at all levels ought to be as much openness as is possible. There are a few situations in which it is appropriate to withhold scholarship from public view, but they should be carefully defined and circumscribed. After all, the point of our institutions is to increase public knowledge and to put learning at the service of society. And there are several ways in which scholars benefit personally by sharing their work widely. The SJSU student hoped that potential employers would see his work and be impressed; how can a university object to that hope? Indeed, it reflects the professional ambitions of most scholars, and they, like our student, benefit in that ambition if they share their work as openly as possible. Openness should be the default for academic work, and closed access only an alternative when there are clear and coherent reasons that

justify it. In this case, the student has something important to teach the professor about the important values of academia.

An appropriate way to close this reflection is to point to the [web site for the Open Student organization](#), where students are working constantly to remind the academy that openness and public access are key elements to embodying our educational mission.



# The World Blind Union, Amazon and the Author's Guild — more from the eIFL conference

*Thu, 09 Apr 2009 13:02:37, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

One of the most passionate and compelling speakers at the eIFL 2nd IP conference in Turkey last month was [Chris Friend](#), who is the strategic priority leader for the World Blind Union's Right to Read initiative and also works with Sight Saver's International training blind leaders in Africa. A couple of private conversations with Chris and his wife Judy gave me a much-needed education on the copyright issues facing vision-impaired people and the wide array of technological solutions that could be available if the IP problems were solved. Also, our hotel room was next to that of Chris and Judy, so my wife and I were often lulled to sleep by the rhythmic sound of his text-reader. At the conference, Chris presented about the World Blind Union's proposed treaty before the world Intellectual Property Organization "for blind, visually impaired and other reading disabled persons."

The treaty, which is [linked in a variety of formats from this page by Knowledge Ecology International](#), makes for interesting reading. It represents a carefully constructed effort to craft an exception to international copyright law that would make it easier for visually impaired people to find books in accessible formats. Of course, WIPO has not been very interested, until recently, in harmonizing exceptions and limitations to copyright law, only protection. But there are signs that that is changing, and the WBU proposed treaty would be a great place for WIPO to start.

The treaty includes five provisions that I want to highlight.

First, it would permit users to reproduce works into accessible formats without authorization and to distribute those formats on a non-profit basis exclusively to visually impaired persons (article 4a). Second, it would permit distribute on a for-profit basis if the work is not reasonably available in an accessible format (article 4c). Third, it provides a useful definition of what "reasonably available" means, pegged to the price of the non-accessible version of a work and distinguishing between what is reasonable in the developed world and what is reasonable in the developing world (article 4d). Next, the proposed treaty includes a provision to permit circumvention of technological protection measures when those measures would prevent the creation of accessible formats (article 6). Finally, the treaty would explicitly state that contractual provisions that are contrary to the treaty would be voided (article 7). These last two provisions are extremely important as any discussion of harmonizing limitations and exceptions gets started, and we should be grateful to the WBU for stating them so clearly and in such a compelling context.

All this took on added urgency for me this week as another group that represents visually impaired people, the National Federation for the Blind, held a protest outside the headquarters of the Author's Guild. The protest, about which there are [photos and a story here](#), was because of the pressure brought to bear on Amazon to disable the text-to-voice features on its Kindle 2 e-book device. As [I have written earlier](#), the legal claim made by the Author's Guild that Kindle was infringing their copyrights was insupportable, but nevertheless, Amazon choose to cave in rather than risk a court battle, even one it could clearly win. I find myself wondering why, if the Kindle feature is a copyright infringement, the Author's Guild is not also opposing the text-reading software that Chris Friend was using in Istanbul;

could it be something as obvious as avoiding really bad PR? Anyway, the National Federation for the Blind is now taking the Author's Guild to task for opposing a technology that, whatever other uses it might have, would be a great boon to the visually impaired. Kindle 2 is not an ideal technology for blind people — one must still see well enough to turn pages in order to use it — but the text-to-speech function, combined with Amazon's wide array of available e-books, would surely assist a great many people experience literature that would otherwise be unavailable to them. Copyright law should not, and as of now does not, when understood properly, stand in the way of this benefit. Nevertheless, the flap over Kindle 2 helps make the point that exceptions for the blind and visually impaired must be built in to copyright law at the highest level in order to prevent self-serving misinterpretations from further burdening those who want to exercise their "right to read."

# Interesting development in Georgia State case

Wed, 01 Jul 2009 07:15:56, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

The copyright infringement lawsuit brought against Georgia State University by three major publishers has been in a relatively quiet phase recently. Discovery, the process of gathering evidence and deposing witnesses, can be very dramatic, in fact, and decisions made during that phase of a trial can do much to determine who wins and who loses. But it largely takes place outside of public view. Nevertheless, there was a development in *Cambridge University Press, et al. v. Georgia State University* last week that could significantly change the stakes for the rest of the academic world as it watches this case unfold (thanks to Jeff Graveline at UAB for pointing this ruling out to me).

This gets a little technical, so bear with me.

When the lawsuit was first filed, lots of librarians and other academics read the complaint and thought, if that is what GSU has been doing, they have really been pushing the envelope. The copyright policy under which the University System of Georgia operated was the work of a brilliant scholar, but it represented a very liberal interpretation of the law. The complaint outlined objections to the policy, as pushing the interpretation of fair use too far, as well as citing practices that seemed outside even the broad scope of the Georgia policy.

Earlier this year, the Georgia Regents [adopted a new copyright policy](#) after a select committee reviewed and entirely rewrote the older one. The new policy is shorter, more easily comprehended and more pragmatic. In fact, it comes a lot closer than its predecessor to reflecting policies around electronic course content that are common on many campuses.

After this new policy was adopted, attorneys for GSU filed a motion for a “protective order” which would state that only information about electronic course content going forward, under the new policy, could be “discovered” by the plaintiffs. GSU argued that since they were a state institution, and therefore entitled to immunity from damages, the plaintiffs could only get prospective relief (an injunction) and therefore should be limited to information about practices related to the policy under which GSU would go forward. After some legal maneuvering, the Judge [granted this request last week](#).

As I read the Judge’s decision on this motion, the only reason the Plaintiffs now need to know anything about prior practices at GSU would be to argue that the new policy has not really changed anything. And Judge Evans has now held that enough has already been revealed about past practices to support or refute that argument.

For the rest of us, this means that the decision about fair use, if the case gets that far, will be a lot more relevant to e-reserve and course management systems use around the country. That, of course, could be a good thing or a bad thing, depending on how the decision goes. But it seems the decision will be based on policy and practice a lot closer to what many schools use (assuming, of course, that the new policy really does indicate changes in practice). Presumably a ruling in favor of fair use is a little more likely now that it will be decided on the basis of this more pragmatic policy. And such a ruling would more clearly support wide-spread practices in higher education. On the other hand, a ruling against

Georgia State, if it happens, would be much harder for the rest of us to explain away and distinguish from our own practices.

# A sequel on Salinger

Wed, 15 Jul 2009 07:18:11, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

In a comment about my [previous post concerning the decision](#) to grant a preliminary injunction in the *Salinger* case, effectively banning US publication of a story about Holden Caulfield 60 years later, the writer took me to task, quite harshly but with some justification, for my cursory and sweeping denunciation of the decision. My post implied, although I admitted at the time that I had not read the entire ruling, that the Judge's decision was uninformed. Now that I have [read the opinion](#), I must admit that it is not uninformed, but wrong for several other, more subtle, reasons.

First, as I said originally, Judge Batts does not adequately address the idea/expression dichotomy built into copyright law in section 102(b). She acknowledges the concept early on in the ruling, even citing it as one of the elements that reconciles copyright with the First Amendment, but then does not mention it again. The result of this omission is that she never tries, in her analysis of the alleged similarities between "Catcher in the Rye" and "Forty Years Later" to distinguish protectable from non-protectable elements before making the comparison. This is standard practice in the substantial similarity analysis, and its absence leads the Judge to cite some amazing things as evidence of copyright infringement, such as the fact that both characters are liars, both complain a lot, and both travel to NYC.

It is certainly true that one can infringe in ways other than verbatim copying, but one must still show substantial similarity with protected expression; it is not enough to say that the protagonist in *Catcher* is delineated in words and therefore any word picture that is similar, even merely because it uses similar ideas, must infringe. I am reminded of the case brought against Dan Brown for infringing the copyright in "Holy Blood, Holy Grail" with his "The Da Vinci Code." The basic idea in the two books is fundamentally the same, but the case was dismissed (in the UK) because the court separated out unprotectable ideas and then found no substantial similarity. That should have been the procedure, and the outcome, in the *Salinger* case as well.

I think a good deal of the problem is that the Judge spends too much time on the discussion of whether or not the new work is a parody of the old. Even when she turns to other transformative purposes in her analysis, the Judge never really moves past the parody issue, since she focuses entirely on the (critical) use of J.D. Salinger as a character in the new novel. But there are many kinds of transformative uses beyond these two types (which are really not very different); the Judge needed to consider the broad range of purposes listed in section 107 as examples of fair use in order to evaluate the full scope of possible transformation.

A clue that there is a problem with the *Salinger* ruling is that Judge Batts finds pretty explicitly that no unauthorized sequels would ever be non-infringing, but she offers no guidance at all about where the line is between impermissible sequels and other types of work, such as reference works that describe and analyze characters, settings and plots. Essentially, the exclusive right over derivative works has been allowed to swallow the idea/expression distinction that is really vital to American copyright law, and the Judge offers us no way to mitigate or reconcile that result. In fact, she tries rather feebly to make something positive out of her error here by suggesting that the right to *prevent* a sequel might actually give an incentive to an author to write a novel, secure in the knowledge that they will have the last word about every thought or idea they express. Even if one assumes lots of authors as unsocial and controlling as Salinger, this is not a recipe for promoting the arts, whatever the Judge tries to argue.

This severe limitation on future creativity points up the last problem I want to cite in the *Salinger* ruling, and in many ways it is the most damaging. Even though it is part of the required findings for issuing a preliminary injunction, Judge Batts never considers the balance of hardships between the parties if she grants the injunction, nor does she weigh the public implications of this prior restraint of speech, except with this odd argument about incentivizing authors who cannot tolerate followers. These considerations are not optional when ruling on a preliminary injunction, and their absence should lead to reversal at the appellate level. But even more important than following the letter of the Federal Rules of Civil Procedure is recognizing that it is absolutely vital that the public interest be considered whenever a judge is considering a request to ban a book, lest he or she run roughshod over the Constitution they are sworn to uphold.

The real problem with this ruling is not that it is uninformed, but that it misses the forest (including the public interest) due to its nearly exclusive focus on one tree.

# That pesky checklist

*Sun, 19 Jul 2009 09:52:09, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use]*

The recent flurry of activity in the copyright infringement lawsuit brought by publishers against Georgia State University has focused attention — mine, at least — on the “[Fair Use Checklist](#)” that has been adopted for use in quite a number of college and university copyright policies. As part of the mini-controversy over the naming of Dr. Kenneth Crews from Columbia University as an expert witness for the trial, the [plaintiffs have objected](#) that Dr. Crews, as a co-author of the checklist that is part of GSU’s new policy (see a previous post on this topic [here](#)) cannot be an impartial witness. In one sense this seems an odd objection, since experts are hired by each side in a lawsuit precisely because they favor the position taken by the party that hires them, but it also offers a chance to reflect on the use and misuse of the fair use checklist and to begin to explain publishers’ ambivalent attitude toward it.

There are two obvious problems with the checklist, it seems to me. First, it can encourage a falsely mechanical view of fair use, where a “score” of seven pro versus six con, for example, means something is definitely fair use, while a one-digit reversal means it is not. That, of course, is not how fair use really works, and no score card can actually predict the results of a judicial evaluation of the fair use factors. Second, the checklist would be pretty easy to manipulate so that it tends toward the result someone is seeking. There has been some discussion, for example, about whether or not there needs to be an equal number of check boxes on each side (favoring fair use v. disfavoring fair use) in order for the checklist to itself be fair. Although this seems plausible, it is important to remember that courts have not necessarily articulated an equal number of circumstances to be considered on each side of the argument, and the checklist seeks to guide its user through the considerations that are actually in play, not some artificial list created without regard to case law for the sake of balance.

Against these two problems, both of which can be quite real, there are also a couple of sound reasons for using the checklist. First, the very mechanical nature that makes it an imperfect tool also makes it one that can be used quickly and without an entire course in copyright law by staff and faculty. These are the major groups that need to make fair use decisions day in and day out; the checklist is a way to at least be sure that they think about all of the factors that are relevant. There are many people on college campuses that seem to believe that any educational use is a fair use, and the checklist helps counter that simplistic belief and remind all of its users of the full-range of necessary considerations. Second, the checklist provides documentary evidence that a full fair use analysis was undertaken. Since part of the “remedies” section of the copyright act gives college and university employees partial protection from damages for infringement when they make a good faith fair use decision, even if they turn out to be wrong, evidence of detailed analysis helps protect the institution from potential liability.

These two arguments in support of using a checklist may help explain the ambivalence that the publishers have shown toward its use. The Association of American Publishers has announced support for several university policies that include the checklist, including [Cornell’s](#) and [Syracuse’s](#), but they have lately seemed more hostile towards it. It is easy to see why, really. On the one hand, it is in publisher’s interest to have university employees get beyond a simplistic view of fair use, which is usually too generous, and look more closely at the full range of considerations that need to be taken into account (this explains, I think, the use of a [version of the checklist](#) by the Copyright Clearance Center as well). On the other hand, that deeper consideration will, itself, make universities less attractive targets for litigation, which seems to be the chosen weapon in the battle to narrow educational fair use.

I have to admit that I too feel a good deal of ambivalence toward the checklist, albeit for somewhat different reasons. I would like every staff and faculty member who must make fair use decisions to have a complete and nuanced view of the doctrine they are applying. But I recognize how impossible that is. Until our campuses are populated entirely by IP lawyers (may that day never come!), I will continue to believe that the fair use checklist is a highly imperfect, but even more highly necessary, tool for navigating the traitorous waters of contemporary fair use.



# The elements of an open access quiz

Wed, 22 Jul 2009 14:59:02, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]

When I was a first-year law student, my professor for Torts used to threaten to call us up at 3 am and demand that, before we were fully awake, we be able to recite the elements of a negligence claim — duty, breach, causation and harm (thanks, [Prof. Darling](#)). I was reminded of this demand by a small part of a recent news story, and the thought of three “elements” about open access that I would like to see every member of university promotion and tenure committees remember, even if quizzed in their sleep.

The news story, from the Chronicle of Higher Education, [reports on an unusual tenure process at the College of New Jersey](#). The Dean and faculty panel recommended against granting tenure to Professor Nagesh Rao, but the Provost and Board of Trustees disregarded that recommendation and granted tenure, after considerable internal and external protest. My interest in the story is focused on one small comment, where Professor Rao is describing the reasons he thinks the faculty panel recommended against tenure. In addition to mentioning that his subfield may be subject to some bias, he says that one of the principal places where he is published, an open access online journal called “[Postcolonial Text](#),” may have been “arbitrarily devalued” due to its business model.

For the record, “Postcolonial Text” is a peer-reviewed journal published on the [Open Journal Systems \(OJS\) platform](#). I recently published (shameless plug alert) an [article on open access for theological studies in an OJS journal](#), and can testify that the peer-review process — which is determined by the editors, not by the publication medium — was as rigorous as any traditional publication I have experienced. We have reached the point, I think, where the notion that online or open access is somehow not as scholarly as print, toll-access publication is no longer a reflection on open access itself, but is an indication that some academics have simply failed to pay attention to radical changes in the environment for scholarship. If what Professor Rao says is true, it shows an embarrassing ignorance on the part of the panel that evaluated him.

So what are the “elements” of open access I want everyone who is responsible for evaluating scholarship to be able to recite, even when awakened in the dead of the night? They are as follows:

1. Online open access journals are as likely to be peer-reviewed as are traditional print publications. The medium cannot be used as a surrogate for investigation into the editorial practices and personnel of a given forum.
2. Open access based on an author fee is not a form of vanity publishing, and these arrangements, which are usually traditional journals with an open access option added on, are peer-reviewed in precisely the same way as traditional publications in the same journal. They should be weight in an evaluation process in exactly the same way.
3. Many, perhaps most, works which an author self-archives in an institutional or other repository are also published in peer-reviewed forums. P&T committees should not dismiss works just because they can be found in an open access repository, and authors should be responsible for ensuring that sufficient metadata accompanies the article to tell anyone who finds it about its peer-review and publication history.

# Books in the cloud

*Sun, 26 Jul 2009 18:51:44, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

There have been lots of reports flying around recently about the decision by Amazon to delete copies of two works by George Orwell (ironic, that) from the Kindle devices of folks who thought they had bought those books for once and for all time. There are reports and comments about this [here](#), [here](#) and [here](#). Technologically naive as I am, my first response to the story was “wow, I didn’t know they could do that.” My second response was to reconsider my growing inclination to buy a Kindle.

The really meaty issues, of course, are not whether I buy a Kindle or not, but relate to copyright issues and privacy. We are used to the idea that a copy of a book is mine to do with as I please once I have purchased a legally-made copy of it. The same is true of a CD or a DVD; I can rent, donate, destroy, lend or resell the single physical copy that embodies intellectual property because of the provision in our law called the doctrine of first sale. We know that first sale does not necessarily apply in the same way to digital files, but the Kindle cases really push the issue. Everything about the purchase of an e-book from Amazon looks like a sale, and consumers can easily be forgiven for thinking that they own something at the end of the process. It is probably time for a legislative look at how first sale applies in the digital world. While there have been suggestions of a “forward and delete” model for digital first sale that would allow a consumer to transfer a digital file to someone else as long as copies were not multiplied, this situation raises a more fundamental question. When can a transaction that looks like a sale be treated as a mere license, and when will consumer protection concerns step in to enforce the privileges that go with a purchase?

It is important to note that, in the case of “1984” and “Animal Farm,” there was no question of preventing consumers from making unauthorized copies, which is the usual reason given for the assertion that first sale does not apply to the digital environment. Here, it was Amazon that was selling the unauthorized copies, and consumers were deprived of ownership by remote action, even after they had purchased the books. Why this could not be remedied by having Amazon pay the rights holder for the infringement, which would have been the solution if a publisher distributed print copies of a book without authorization from the copyright holder, is not clear to me.

One thing that several of the stories about this contretemps have in common is reference to Jonathan Zittrain’s must-read book “[The Future of the Internet... and how to stop it](#).” It is always good for an author when he correctly predicts a technological trend, and Zittrain got this one dead-on. His warning that the Internet is moving away from the programmable devices that fostered so much innovation toward tightly-control, “tethered” appliances proves eerily prophetic when Amazon starts deleting books from consumers’ devices. It makes reading Zittrain’s discussion of all of the implications of this development that much more important.

Zittrain had an excellent op-ed piece in the New York Times on July 20, called “[Lost in the Cloud](#),” that discusses some of the privacy and censorship issues that are inherent in the development of these Internet appliances and makes brief reference to the Kindle issue. I am happy to be able to report that Zittrain will be coming to Duke during the upcoming academic year as part of our Provost’s Lecture Series; I cannot imagine a more important discussion to have than one about the issues he is raising.

# Orphan works, fair use and best practices

*Thu, 30 Jul 2009 15:19:26, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: open-access-and-institutional-repositories]*

All of the above are recurrent themes in copyright and scholarly communications these days, but a recent publication from the [Society of American Archivists](#) has put a little different spin, I think, on an ongoing conversation.

The SAA released a revised version of their [Statement of Best Practices on Orphan Works](#) on June 17. In the statement about the purpose of the report, the SAA makes specific reference to the two bills that were considered by Congress in 2008 as attempts to solve the orphan works problem (I blogged about those bills [here](#) and [here](#)). The revised statement of best practices is an explicit attempt to define a term that was used in those bills — a “reasonably diligent search” for a copyright holder. It would be only after such a search that a remission of the damages for a user of an orphan work would be available under these bills, and the SAA is trying to suggest standards and practices that define what is reasonable and diligent in the real world of archival materials.

It is important to realize that there are two different approaches to using orphan works. The bills proposed in Congress take a remedies-based approach, offering a substantial reduction of the possible penalties for users of orphan works if they first undertake a reasonably diligent search and, subsequently, a rights holder surfaces and demands compensation. The SAA statement of best practices is directly related to this approach and undertakes to define the steps necessary if such a search requirement is enacted. But the statement of best practices also recognizes another option, reliance on fair use. The statement says “Fair use may be a better rationale for creating a copy or publishing a copy of a document,” but it does not make an explicit connection between fair use and the best practices outlined in the remainder of the statement.

Fair use is an exception to copyright’s monopoly that already exists and is currently available to potential users of orphan works. The value of the “reasonably diligent search” in the fair use context is that it would have, I believe, a profound effect on the fourth fair use factor, the impact on potential markets for the work. If a search such as is suggested in the SAA statement is carried out and no rights holder can be located, that would go a long way toward showing that no market is being harmed by the use (especially if the use itself is educational and non-profit). In this situation, it is hard to imagine a court actually rejecting a fair use defense, and even if such a defense did fail, archivists and other employees of non-profit institutions could still fall back on the partial remission of damages that is provided in section 504(c)(2) of the Copyright Act. As the SAA notes, a reasonable belief in fair use, even when a court disagrees in the end, “is sufficient to protect the archivist from statutory damages.” Such protection is not as complete as would be provided by an orphan works bill, but it is nonetheless substantial. In the end, it really might make more sense for educational users to rely on fair use when contemplating a use of an orphan work, after employing some or all of the strategies in the SAA statement of best practices to try and find a rights holder. Waiting for Congressional action may be both impractical and unnecessary.

Whether orphan works legislation proves useful or not will depend in large part on the details of any final bill. There were strong hints last time that in order to gain approval, a bill would become so burdensome and expensive that the library and archives community would be better off without new legislation, simply relying on fair use. No doubt that debate will be revived if any orphan works bills are re-introduced. But the SAA has made an important contribution from either perspective that one takes.

In regard to potential legislation, they have offered a standard that legislators should consider as they draft a bill, as well as one that those concerned about the burden created by legislation can look at to measure the depth of the problem. In regard to those who would rely on fair use, the statement of best practices provides a set of guidelines that can help give users confidence that they are truly making a good faith fair use effort.

# Libraries versus Salinger?

Thu, 06 Aug 2009 09:11:59, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

On Monday three major library associations, along with several other groups dedicated to supporting free expression and new creative work, filed a [“friend of the court” brief](#) in the appeal of the decision made in June to issue an injunction prohibiting the US publication of “Sixty Years Later: Coming Through the Rye,” a continuation of the story of Holden Caulfield that was begun in J.D. Salinger’s “Catcher in the Rye.” I wrote several times about the case last month, and had a small role in rounding up the “amici” who participated in the brief, but I read the final product for the first time last night. A couple of points struck me in the section of the brief addressing fair use that I would like to highlight. A discussion of the case, and the arguments presented by the library organizations, from Tony Falzone, the Counsel of Record on the brief, can be found [here](#).

First, I was struck by the excellent arguments made about how vital fair use is to supporting new creation, especially in the realm of creative literature. As theologians (and Julie Andrews) have known for years, nothing comes from nothing, and the edifice of creative writing is always built on an extensive foundation. From Shakespeare to Leonard Bernstein, Charles Lamb to Stanley Fish, new authors and literary critics use the grist provided by earlier writers to feed their imaginative mills. In this context, the brief quotes a really amazing question from the judge who issued the injunction being challenged. During the hearing she asked, in response to the argument that “Sixty Years Later” offered readers a new way of looking at the now quite old story of “Catcher,” “do people need [the new] version in order to view the story differently? How about just reading it twice, or maybe five years later.” Of course, this is not how literature or literary criticism works. New works are never *sui generis* (not even *Catcher in the Rye*), and Judge Batts’ logic would deprive each new author of those giants upon whose shoulders, Issac Newton famously reminded us, we must all stand if we wish to see clearly. Salinger may not think of himself as such a giant (and I admit I do not either), but he still cannot be afforded the level of control over future works that he seeks and that the court erroneously granted to him.

The depth of the problem is illustrated by the other aspect of the brief that caught my attention. I had noted before that Judge Batts argues that some authors might actually have an additional incentive to write if they knew that they would be protected from sequels and criticism; if they were assured, in effect, that they would have the last word regarding the characters, events and ideas about which they wrote. What I had not seen, but the brief points out, is that the Judge is here importing the concept of “moral rights” into US law. Many countries do recognize the moral rights of attribution and “integrity” — the right to protect a work from alteration. The United States does not recognize these rights, with one very limited exception, and restricts the copyright incentive to economic rewards. The District Court ignores this policy decision, presumably made to support the free expression of ideas that is necessary for a democratic society, in favor of serving the desire of an author from a previous decade to exercise extraordinary control over the future of the ideas and characters he published. As the brief points out, there is no logical endpoint to the reasoning evoked here; if an author were incentivized by protection from negative reviews or parodies, shouldn’t we forbid those as well? This is not how copyright works, because its fundamental purpose is to encourage new creativity, while the Judge’s reasoning would create a sterile world in which creative dialogue would be impossible.

One of the news reports about the filing of this brief carries the title [College Libraries v. J.D. Salinger](#). It struck me as I read the brief how unfair that title is. Librarians traditionally have great respect for authors, and libraries serve authorship by being places where the great ideas and expressions of the

past are readily accessible to current writers and scholars. Unfortunately, it is Salinger's efforts to use copyright to ban a new book that is incompatible with both the mission of libraries and the purpose of copyright law. Both libraries and copyright law support fundamental democratic values — free expression and the "marketplace of ideas" that asks each new intellectual creation to prove its worth by submitting to examination, criticism and even parody. Occasionally copyright is wielded as a weapon, as in this case, to try and insulate some author from that rough-and-tumble exchange of idea. When libraries oppose those efforts, they are calling both copyright law and authors in a democratic society to stay true to themselves.

# Choosing between reform and revolution

*Thu, 13 Aug 2009 10:25:27, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use, category: scholarly-publishing]*

A recent article by Steven Shavell called "[Should Copyright of Academic Work be Abolished](#)" caught my notice, as I am sure it did for many others, because of the radical question posed in its title, but it ultimately focused my attention on a different article altogether. I hope to have more to say about Professor Shavell's work in a later post, but here I want to record my initial reaction, which was that copyright in academic works need not be abolished but should be heavily reformed. And the best reform I can think of (short of legislative revision) is the re-evaluation of fair use, based on more attention to the second fair use factor, that is suggested in Robert Kasunic's article "[Is That All There Is? Reflections on the Nature of the Second Fair Use Factor](#)."

The second fair use factor — the nature of the copyrighted work — is usually treated very mechanically by courts, and sometimes is ignored altogether. When it is discussed, it is in a few sentences addressed to only two issues — whether the work is published or not and whether it is creative or factual. Kasunic, who is Principal Legal Advisor to the Copyright Office, suggests that this treatment seriously undervalues the importance of this part of the fair use analysis. He argues convincingly that the second factor, when examined carefully, offers a wealth of information that could improve consideration of all of the fair use factors. Indeed, one of his major points is that the fair use factors are a guide for fact-gathering, not a mechanical "tally sheet" or scorecard.

If courts pursued the probing questions about the nature of an original work that Kasunic suggests when considering a claim of fair use, the result for academic work would be, I think, truly revolutionary, because those courts would learn how much more leeway should be accorded to academic work than would be appropriate for other types of work. Kasunic argues that part of the scrutiny that should be applied to the original work would ask what the particular incentive structure for that type of work is. When the purpose of copyright law is understood properly, as a mechanism to give incentives for creation, the expectations of the authors and creators are really the only guide for what uses should be compensated and what uses need not be. Thus it is important to ask what the normal incentives for creators of that particular type of work are and what markets supply those incentives. Unexpected markets, or markets that benefit only secondary owners of copyrights rather than authors, are not relevant in deciding if a particular use is fair or not.

When academic work is considered, it is clear that the scope of fair use would be very broad under this more sensitive and sensible analysis. Academics are usually not paid for their most frequent works of authorship, journal articles, and compensation for books authors is meager. Thus the protection of various markets is not necessary for this type of work in order to effectuate the purpose of copyright; incentives for authors clearly come from some place else. Also, it is usually a secondary copyright holder who is trying to protect those markets, which further reduces their value as an incentive for creation. Finally, secondary markets, such as permission fees for electronic reserves and course packs are usually wholly unexpected, and therefore have no incentive value, from the point of view of academic authors. In fact, I once had a faculty author ask me if a check from the Copyright Clearance Center was some kind of scam, so unexpected was the tiny windfall he was being offered.

As Kasunic points out, different types of authorship receive different rights under our copyright law; it is logical, therefore, to also think about fair use differently depending on the specific facts that surround the creation of a particular category of work. Academic works would, in such a fact-specific analysis, be

subject to much more fair use than a commercial novel, film or song. Indeed, Kasunic selects as the example with which he closes his article the case of academic authors and fair uses claims for course packs and electronic reserves. Although he does not spell out a conclusion, it is clear from his discussion that the facts uncovered by the searching analysis he recommends would greatly favor a liberal application of fair use for that type of work.

Since an actual case such as Kasunic describes is currently being litigated — the lawsuit against Georgia State University alleging copyright infringement in the distribution of electronic course readings — it is hard to resist reading his article with that case in mind. Kasunic presents, to my mind, a compelling argument that the court should look very careful at why the works in question were created in the first place and focus a fair use finding on the incentives for creation and not extraneous claims for windfall profits made by secondary copyright holders. This would be a sensible application of a factor that has largely been treated as unimportant; it would take seriously the intent of Congress and their instructions to courts when they codified section 107. And it would dramatically increase the likelihood that many of the uses in question at Georgia State (at least those uses that involve academic writings) would be found to be fair use.



# A model copyright law

*Sat, 22 Aug 2009 14:20:51, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip]*

Back in April, when I was [writing about the experiences](#) I had at the eIFL-IP conference in Istanbul, I referred several times to the “Draft Law on Copyright, Including Model Exceptions and Limitations for Libraries and Consumers.” A copy of the Draft Law was distributed to the IP Conference participants “hot off the presses.” When I mentioned it back in April, I promised to provide a link as soon as it became available on the eIFL website. I am now delighted to be able to direct folks to the [full text of the Draft Law](#), available as a PDF and soon to have an HTML version accompanying for easy browsing.

The goal of the Draft Law is to provide librarians and their legal advisers with practical ideas to help them understand and influence the policy making process when national copyright laws are being revised. It is directed toward developing countries, from which the majority of eIFL’s membership is drawn. But there is much for all of us, in the US and the EU as in the developing world, to learn from this document. Its clear set of definitions and the explanatory notes that accompany each exception and limitation make it ideal for gaining a synoptic view of the state of international copyright law. Most important is the consistent focus on the public interest and the socially beneficial purpose that copyright law is intended to serve.

It has become a regular complaint about international copyright law that great strides have been made in harmonizing the levels of protection for intellectual property around the globe, but little effort has been made to harmonize limitations and exceptions. Indeed industry lobbyists and even the U.S. Trade Representative often pressure developing countries to adopt draconian levels of IP protection while encouraging them to ignore or drastically limit the role of limitations and exceptions. The result is often that copyright law becomes an obstacle to intellectual and creative development in many countries. The World Intellectual Property Organization has seemed to awaken to this problem over the past two years, and has recently included [copyright limitations and exceptions](#) as part of its discussion, especially in the context of it’s so-called “[development agenda](#).” The eIFL Draft Law is an important contribution to this vital discussion, especially because it offers model limitations and exceptions that are designed to facilitate access to knowledge and the public interest. It is a document that deserves study in both the developing and the developed world as we consider how IP law can serve its purpose of encouraging learning and creativity rather than stifling them.

# Moving beyond the photo album

*Thu, 27 Aug 2009 07:30:06, ksmith12@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies]*

Last week [G. Sayeed Choudhury](#), Associate Dean for Library Digital Programs at Johns Hopkins University, came to Duke to talk with the staff of the Libraries about e-scholarship and the changing role of the university library as part of our strategic planning process. His presentation and conversations were fascinating, and we were left with a great deal of thought-provoking material to consider. I was particular struck by one observation, which was actually Choudhury quoting from a 2004 article that appeared in [D-Lib Magazine](#) by Herbert Van de Sompel, Sandy Payette, John Erickson, Carl Lagoze and Simeon Warner. In the article, "[Rethinking Scholarly Communications](#)," the authors assert their belief that "the future scholarly communications system should closely resemble — and be intertwined with — the scholarly endeavor itself, rather than being its after-thought or annex." The article further makes the point, perhaps more obvious now that it was five years ago, that "the established scholarly communications system has not kept pace with these revolutionary changes in research practices."

In developing this point, Choudhury talked about the traditional research article as a "snapshot" of research. Those snapshots are increasingly far-removed from the actual research process and have less and less relevance to it. Indeed, the traditional journal article seems more like a nostalgia item every day, reflecting the state of research on a particular topic as it was at some time in the past but beyond which science will have moved long before the formal article is published, thanks, in part, to the many informal ways of circulating research results long before the publication process is completed.

Choudhury called on libraries to move past a vision of themselves as merely a collection of these snapshots and become more active participants in the research process. He recounted a conversation he had with one researcher who, in focusing on the real need he felt in his own work, told Sayeed that he did not care if the library ever licensed another e-journal again, but he did need their expertise to help preserve and curate his research data. The challenge for libraries is to radically rethink how we spend our money and allocate the expertise of our staffs in ways that actually address felt needs on our campuses and do not leave us merely pasting more snapshots into a giant photo album that fewer people every day will look at.

Recently I have seen a lot of fuss over an article that appeared in the Times Higher Education supplement that posed the question "[Do academic journals pose a threat to the advancement of science?](#)" The threat that the article focuses on is the concentration of power in a very few corporate hands that control the major scientific journals. But read in the context of the radical changes that Choudhury, Van de Sompel and others are describing, it is clear that the threat being discussed is not a threat to the advancement of science but to the advancement of scientists. Scholars and researchers have already found a way around the outmoded system of scholarly communications that is represented by the scientific journal. The range of informal, digital options for disseminating research results will not merely ensure but improve the advancement of science. All that is left for the traditional publication system to impede is the promotion and tenure process of the scientists doing that research.

This, of course, is the rub, especially for libraries. Traditional scientific journals are increasingly irrelevant for the progress of science, but they remain the principal vehicle by which the productivity of scholars is measured. One researcher told Choudhury very frankly that the only reason he still cared about publishing in journals was for the sake of his annual review. Sooner or later, one hopes that universities will wake up to the tremendous inefficiency of this system, especially since the peer-

reviewing on which such evaluations depend is already done in-house, by scholars paid by universities but volunteering their time to review articles for a publication process with diminishing scholarly relevance. Nevertheless, the promotion and tenure system still relies, for the time being, on these journals, which presumably cannot survive if libraries begin canceling subscriptions at an even faster rate. The economy may force such rapid cancellations, but even if it does not, pressure to move to a more active and relevant role in the research process will. The question librarians must ask themselves is whether supporting an out-dated system of evaluating scholars is a sufficient justification for the millions of dollars they spend on journal subscriptions. Even more urgently, universities need to ask if there isn't a better, more efficient, way to evaluate the quality of the scholars and researchers they employ.

# Maybe not so revolutionary after all

*Mon, 07 Sep 2009 12:21:42, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

When I [wrote a few weeks ago](#) suggesting broader latitude for fair use in the case of academic and scholarly works, I contrasted that position to the more “revolutionary” one proposed in the title of Steven Shavell’s recent article “[Should Copyright of Academic Works be Abolished?](#)” Shavell, who is professor of law and economics at Harvard, premises his argument on the same phenomenon that I stressed in my blog post — the lack of incentive provided by copyright for academic authors. He builds an elaborate economic model to demonstrate that authors would be as happy or happier to continue to create their works and society as a whole would be better off if academic copyright were eliminated, as long as, he suggests, publication costs were subsidized by universities or grantors. He writes, “if publication fees would be largely defrayed by universities and grantors, as I suggest would be to their advantage, then the elimination of copyright of academic works would be likely to be socially desirable.” Read in its entirety, however, this position is not as revolutionary as it might seem, and probably is less desirable from the perspective of academic authors than the suggestion I have made about broad fair use.

For one thing, a broad interpretation of fair use would help address one of the problems that Shavell is trying to solve with his proposal — the labor and permission costs associated with providing material for students in colleges and universities. But more important, Shavell’s proposal that academic copyright be abandoned addresses neither all the legitimate concerns of academic authors nor all of the problems with the publication system as it now exists.

When Shavell speaks of universities defraying the costs of publication, it is important to remember that efforts at open access on campuses are one way in which universities are already doing this. Shavell is well aware of this, and discusses open access movements at some length. He ultimately concludes that such movements will be too slow because of what he calls the individual versus social incentive problem. Each individual lacks sufficient incentive to make the change, even though the result would benefit society as a whole. The result is that Shavell decides that a change in the law is needed, removing academic works (which he is at pains to define) from the scope of copyright protection.

My biggest concern with this proposal is that it neglects one benefit which academic authors do gain from copyright, the ability to control the dissemination of their work and, especially, the preparation of derivative works. Of course, that control is of little use as things stand today, because copyright is so freely given away by academics who must then hope that the commercial publishers to whom they cede their rights exercise those rights for the best interests of the authors. That is happening less frequently, unfortunately. One of the reasons the Creative Commons license is such a benefit to academics is that it allows authors to both authorize broad reuse of their work and to assert control over that reuse, especially in regard to attribution, which American copyright law does not protect. In order to use a CC license, however, one must be a copyright holder; copyright is the “teeth” that enforce the license. So any analysis of the incentive structure for academic writing must factor in the potential loss of control when considering abolishing copyright in academic works. This is one reason I have suggested broadening fair use for academic work rather than eliminating copyright altogether.

To me, what this suggests is that the problem with academic publishing is not copyright *per se*, but the transfer of copyright to corporate entities whose goals and values are usually quite different than those of academic authors. Because he does not really consider open access a solution to the problem he

outlines, Shavell assumes that the publishing structure would remain very much intact under the no-copyright regime he suggests, simply with a different mechanism for paying the bill. But at least one open access option — a prior license granted to the institution by faculty in their scholarly writings before they submit those works for publication — could restructure publishing in the right direction without losing those benefits that academics really do get from owning copyright.

Shavell does briefly mention such prior licenses, such as those adopted by Harvard and MIT, but does not treat them extensively and does not recognize that some of the difficulties he finds with open access movements would be mitigated by the prior license mechanism. He cites two major problems that would prevent open access from quickly solving the problem he finds with scholarly publishing — the fact that authors will not insist on open access if they have to pay for it and the alleged fact that open access journals lack prestige. Neither of these problems exist for the prior license scheme, which, when combined with a broad latitude for fair use of academic writing, offers, at the very least, a significant intermediate step toward resolving the dilemma of scholarly publishing.

It may be that copyright should be eliminated for academic works, but it would hardly be easy to accomplish. Nevertheless, Shavell's analysis of the state of academic publishing, and its future, is complex and interesting. But while we wait for Congress to move in the direction he suggests (if it ever does) the adoption of institutional licenses for open access to faculty writings and a broad latitude for fair use of those writings, both of which could be implemented immediately, are intermediate steps that would return a great deal of control to the authors for whom that is the major incentive.

# Fairness breeds complexity?

*Wed, 02 Sep 2009 07:06:34, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: digital-rights-management, category: fair-use, category: international-ip]*

The title of this post is an axiom I learned in law school, drilled into us by a professor of tax law but made into an interrogative here. Because the copyright law is often compared to the tax code these days, I have usually just accepted the complexity of the former, as with the latter, as a function of its attempt to be fair. Because different situations and needs have to be addressed differently in order to be fair, laws that seek fairness inevitably (?) grow complex. But a recent [blog post by Canadian copyright law professor Michael Geist](#), nicely articulating four principles for a copyright law that is built to last, has made me ask myself if simplicity is a plausible goal for a comprehensive copyright law.

Geist's four principles are hard to argue with. A copyright law that can last in today's environment must, he says, be balanced, technologically neutral, simple & clear, and flexible. That last point, flexibility, is the real key, since designing a law that can be adapted to new uses and new technologies, many of which are literally unforeseeable, requires that the focus be on first principles rather than outcomes. This is different than the tax code, and it may provide the path to combining fairness with simplicity.

The principle of flexibility explains why fair use is an effective provision of US copyright law. As frustrated as some of us get trying to navigate the deep and dangerous waters of fair use, it has allowed US law to adapt to new situations and technologies without great stresses. In fact, Geist's brief comment on fair dealing in Canadian law suggests (implicitly) that it should be more like US fair use; he argues that the catalog of fair dealing exceptions should be made "illustrative rather than exhaustive," so courts would be free to build on it as technologies change.

In recent posts I have spoken of adapting fair use so that it gives more leeway to academic works than to other, more commercial intellectual properties. Even though Geist is explicit in his post that "Flexibility takes a general purpose law and ensures that it works for stakeholders across the spectrum, whether documentary filmmakers, musicians, teachers, researchers, businesses, or consumers," I do not think there is any contradiction here with asking that academic works be treated differently in the fair use analysis than a recently released movie, for example, might be. Fair use would be applied in the same way to each, but because fair use appeals to the motivating principles of copyright law, it asks us to examine the circumstances of each type of material and each kind of use and measure them against those principles. This is precisely how flexibility is accomplished, and I argue that the result of this uniform application of principles will be different outcomes for different types of works.

Geist's approach to digital locks — DRM systems — is quite similar, asking us to look at first principles that underpin copyright law when deciding how to treat any particular technology. Specifically, he suggests that forbidding or permitting the circumvention of such digital locks must be tied to the intended use for which the lock is "picked" if copyright balance is to be respected. An added advantage of this approach is that it is much simpler — another core principle — than the current approach in the US, where categorical rules are enacted and then a series of complex exceptions are articulated every three years. We will see shortly how that process will play out for the next three years, since the exceptions will be announced in a couple of months, but it is inevitable that the result will be unfair to some stakeholders and probably disappointing to all. Far better that we heed Geist's call for an approach based on first principles. Perhaps Canada, as it considers a comprehensive overhaul of copyright law, can lead the way.

# The joy of statistics

*Tue, 15 Sep 2009 10:25:55, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip]*

The World Economic Forum recently published its 2009 [Global Competitiveness Report](#), and I was struck by one particular statistic, as well as the conclusion drawn from it by the US Chamber of Commerce. One of the many statistical tables in the WEF report ranks the perceived strength of national protection for intellectual property. The United States ranks 19th on this chart, out of 133 countries rated. As this [blog post from IP Watch](#) reports, that ranking prompted The US Chamber of Commerce to call for stronger protection measures in the US.

As someone who believes that IP protection in the US is certainly strong enough and is often over-enforced, I was struck by several flaws in the reasoning of the Chamber of Commerce or, at least, differences about what I think the report could mean.

First, the Chamber of Commerce thinks that 19 out of 133 is a low ranking, a judgment that seems questionable at best.

Second, it is important to note that this chart reports “executive perceptions” about the strength of IP protection in a country. While that may make sense for a report about international competitiveness, it is too subjective a measure to cause Congress to hasten to strengthen our copyright laws.

Finally, I wonder how strength of IP protection actually correlates to economic growth. There is a pretty good correlation between perceived strength of protection and competitiveness in the WEF report, but of course, those books are cooked, since the results of the survey are part of the data on which conclusions are based. I decided to try an experiment, which even as a non-economist I recognize to be crude, albeit interesting. I started with this [list of countries based on economic growth](#) (the growth rate of the Gross Domestic Product) using data from the CIA World Fact Book. The US is 67th in GDP growth rate, and I made a list of ten countries from the G-20 group of nations with higher growth rates than that of the US and compared that list of ten countries to the rankings of perceived strength of IP protection. All ten of these countries, it turns out, are perceived to have weaker IP protection than the US. To choose an obvious example, China has the fastest economic growth rate of any of the G-20 economies, but is ranked far below the US — at 61st — on the list of strong IP protectors.

It is easy to lie with statistics, of course, but this simple comparison suggests that **weaker** IP protections might actually correlate with economic growth, or that in any case there is a median position where IP protection is correctly calibrated to encourage economic growth, and the US has passed that point. This search for the correct level of protection, I think, is something the World Intellectual Property Organization is struggling with as it considers its [“development agenda” recommendations](#). At the very least, nations need to preserve flexibility in their IP laws and recognize that the what is best for Big Content is not necessarily good for a nation.

# What problem can open access solve?

*Sun, 27 Sep 2009 12:59:16, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

A recent conversation on an e-mail list for theological librarians (the branch of academic librarianship in which I began my own professional career) has lead me to reflect on exactly what problem it is that open access is designed to solve.

The exchange involved a journal called “Studies in Religion,” which is subscribed to primarily by seminaries and other small religious colleges and universities. The journal has just announced that it will move from being published by Wilfrid Laurier University Press to Sage Publications, and the cost of an institutional subscription will rise from \$64 per year to \$300, an increase of about 470%. For freestanding seminaries a “price break” will keep the increase down to a mere 350%.

The humanities have been largely insulated from the journal pricing increases that are the origin of the so-called crisis in scholarly communications, but they are fast catching up, unfortunately. In this case, the motive for moving to a new publisher is probably to have “Studies in Religion” included in a large package of online journals. The ironic result, of course, is that many schools with no interest in this title will be forced to subscribe to it while those institutions where it is most needed will likely have to cancel.

I have frequently argued that the solution to the continuing copyright battles in higher education is for scholars to stop transferring copyright to publishers and preserve their right to make their work available in open access. Widespread open access can indeed reduce the need for scholars to ask permission to use their own works and the risk of copyright litigation against colleges and universities. But it will not, by itself, solve the problem of journal prices.

We need to distinguish between the problem of skyrocketing journal costs and the access problem, of which costs are only part of the cause.

There was a time when publication in a prestigious journal, or even a second tier one, brought with it an assurance that all the people to whom a scholar’s work would be important would have a chance to see it. Times have changed dramatically, and that sense of assurance based on publication in a toll-access journal is simply no longer possible. Cost is certainly part of the problem; an increasing number of a scholar’s colleagues will be working at institutions that have had to cancel access to the journal or database in which her work has been published. But it is also the cases that fewer and fewer researchers begin their work by browsing journals, or even journal databases. Internet searches are the first recourse for many seeking information about a new topic or trying to stay current on a familiar one. Articles in toll-access journals may not be found by such searches, or when they are found, the links will not work if the toll has not been paid. Thus new technologies, and the research strategies they generate, are as much a cause of the access problem as prices are. And it is the greater “findability” that open access offers that make it primarily an opportunity for greater access and impact rather than a solution to the pricing crisis.



# Manufacturing controversy

Thu, 01 Oct 2009 14:31:51, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip]

Some copyright cases just don't grab one's attention, and I have to admit that I saw reports of the decision in [Omega v. Costco](#) several times before the potential impact on academic libraries began to sink in. The case involves [chapter 6 of the Copyright Act](#), referred to as the manufacturing clauses. Since the principle requirement of the chapter, that works be manufactured in the US in order to be eligible for copyright protection, expired in 1986, I pretty much ignored the case the first few times I read about it. Now I think that was a mistake.

The case is fairly complicated, and there is a [nice summary of it here, on the IP Law blog](#). The basic [ruling, however, from the Ninth Circuit Court of Appeals](#), was that the doctrine of first sale, the rule that says that one who purchases a lawfully made copy of a copyrighted work may lend, resell, or otherwise dispose of that particular copy, does not apply to works that are manufactured and sold outside the US. Basically, the court held, on reasonably good authority, that such works do not qualify as "lawfully made under this title (i.e. the Copyright Act)," which is a condition on the application of first sale.

Once I paid attention, it became very clear why this is a cause for concern in libraries. Academic libraries especially buy lots of foreign materials, often from overseas distributors. If first sale does not apply to those materials, can libraries lend them at all? A negative answer could devastate our services in support of all kinds of language programs and area studies. This possibility is raised in passing in this [amicus brief](#) urging the Supreme Court to review the case, filed by the Electronic Frontier Foundation. Interestingly, however, the major library associations have not taken a position on the petition asking the Supremes to hear the case. I was given two different reasons for this decision not to act, one which seems sound to me and one which leaves me with some concern.

One reason for not encouraging the Supreme Court to "take cert" (that is, agree to review the lower court's opinion) is that there is real danger that the Supreme Court would affirm the decision. That would make a problematic case from the West coast into binding law throughout the country. Better, perhaps, that this remain an anomalous precedent only impacting libraries in the nine western states that comprise the Ninth Circuit. Several authorities (*Patry on Copyright* and a concurring opinion in an earlier Supreme Court case) seem to support the position taken by the appeals court, and asking for cert might be asking for trouble.

More reassuring, but more problematic, is the other reason given for not taking action on this case — the exception for libraries that is built into the manufacturing clauses. Section 602(a)(3) excludes certain copies purchased by libraries for lending or archival purposes from the general statement in 602 that importation of copies of copyrighted works purchased overseas into the US is an infringement of the distribution right. That seems to let libraries off the hook. But it is not entirely clear that this exception, specific as it is to section 602, actually solves the first sale problem created by the Ninth Circuit. Even if it does, however, I am left with two concerns.

First, the section 602(a)(3) exception explicitly excludes audiovisual works from its scope. For those works, only a single copy for archival purposes is allowed, and no mention of lending is made. This suggests that even if print collections of foreign materials purchased overseas are OK, collections of film are not. That would be a crippling lacunae for academic libraries.

The other problem is that, if the Ninth Circuit ruling stands, it might encourage textbook publishers to move their manufacturing and distributing operations overseas in order to be able to shut down secondary markets and thereby increase their profits. The exception for libraries would not apply to resale of used textbooks, on which so many students depend to reduce their educational costs. Closing off those used book markets would not directly harm academic libraries, but it would certainly hurt higher education. Also, it hardly seems sensible to add to the incentives that are luring American manufacturing overseas.

I am thus left on the horns of a dilemma. I want to see this decision overturned, but I agree that the review that would be necessary to reverse it would also carry a significant risk of an affirmation, which would be far worse. It is an uncomfortable place to be, and one in which a good outcome is difficult to imagine.

# Falling down before the finish

*Wed, 07 Oct 2009 08:58:28, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

This article from the Guardian UK about how [“Google Books deal forces us to deal with copyright”](#) had me nodding in agreement, right up until its last few paragraphs. Like author Nick Harkaway, I am cautiously relieved by the intervention from the Department of Justice that has forced a postponement of the hearing on the settlement in the Google Books copyright infringement case. Harkaway expresses my feelings very succinctly when he writes that “it wasn’t the idea I objected to, but the method.” As I sometimes put the same sentiment, bad law in the service of a worthwhile end can still create unfortunate consequences. So I am hopeful that the extra time and renewed negotiations will lead to a more thoughtful implementation of the books project, perhaps less sweeping but also less monopolistic.

Harkaway also has my agreement when he expands his discussion to the problem of orphan works, and suggests that the Google Books deal gives added incentive to a broader, more generalizable solution for the millions of works still protected by copyright yet for which no rights holder can be found. Harkaway embraces a familiar solution to this problem when he endorses renewed recourse to a renewal system. Under this plan, rights holders would have to renew their copyright claim periodically in order to prevent the work from dropping into the public domain. Thus orphan works would become free for use once a renewal period passed without action by the rights holder. There are other ways to approach the orphan works problem, but it clearly needs to be addressed, and the renewal suggestion would be one very effective approach.

Unfortunately, I stopped agreeing with Harkaway right at the end of his article, when he suggested that data-mining and other new uses for copyrighted works should be sources of new income for rights holders. This is an old mistake based on thinking that whenever new technologies enable new uses, a new right is created. But copyright does not work that way, and there has never been a “use right.” Copyright holders do not get the right to control every use of their work, and thinking about how such a right might work should tell us why — it raises a huge problem of censorship; imagine, for example a book author or film producer who could use copyright to prevent negative reviews. Instead, rights holders get the exclusive right to control copying, distribution, public performance and public display, as well as the creation of derivative works. This is a lot of control, but these rights do not impinge on using a lawfully obtained copy, at least for private purposes like research. Every time a new technology comes along, however, some rights holders are seduced into thinking that they should gain from it, even if it does not implicate any of these exclusive rights.

If digital copies of the world’s books are legally created, through a Google settlement or in some other way, use of those copies for data-mining and other research uses will be, and should remain, free for all users. It may sound plausible when Harkaway complains that Google will be improving its search algorithm using his work and making money from that improvement. But where does a use right stop? Should the heirs on John Updike be reimbursed if digital copies of his work are used to create a Updike concordance? Should an academic who wants to study a certain grammatical construction across a huge range of published literature, a use contemplated by the Google settlement, have to pay the copyright owner of every book in the corpus for that opportunity? It quickly becomes clear why a separate use right within the copyright bundle would be a very bad idea. I can follow Harkaway through most of his article, but when he gets to those last three paragraphs, it is clear he has gone astray.

# Can a “batty” ruling effect needed change?

*Tue, 07 Jul 2009 08:10:17, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use, category: technologies, category: user-generated-content]*

It is thoroughly [unbelievable news](#) that US District Court Judge Deborah Batts has issued a permanent injunction against the US publication of a book that purports to update the story of Holden Caulfield, the protagonist of J.D. Salinger’s “The Catcher in the Rye.” The new book, written by Swedish author Fredrik Colting and already published in Britain, is called “Sixty Years Later: Coming through the Rye” and is told by a 76-year-old man called Mr. C. There is little doubt that Mr. Colting is trying to ride the continuing popularity (which I personally have never understood) of “Catcher in the Rye” by creating a sequel. But there is a great deal of doubt about whether this is a copyright infringement. The portions of the decision I have been able to read suggest that Judge Batts got all of the major copyright issues involved completely wrong.

First there was the fair use argument. In a [very similar case](#) involving a retelling of the the story of “Gone With the Wind” from the point of view of one of the slaves at Tara, the Eleventh Circuit Court of Appeal correctly recognized that the new work was a fair use of material copied from “Gone with the Wind.” And in the [recent decision](#) finding that “The Harry Potter Lexicon” was not a fair use, Judge Robert Patterson, in the same judicial district as Judge Batts, went out of his way to make clear that an author of an original work cannot control all sequels, prequels and reference works. Judge Patterson even writes, citing other precedents in the Circuit, that “a work is not derivative, however, simply because it is “based upon” the preexisting work.” (p. 39) But that erroneous conclusion is exactly the foundation of Judge Batts’ decision.

Judge Batts seems to know only one fair use precedent — the “Oh Pretty Woman” case from the Supreme Court — and she applies it slavishly. Since she does not think that the new book is an actual parody of the original, she holds that it is an infringing derivative work. But it should be clear to anyone who is a federal district court judge that there are other kinds of fair use than parody; indeed, a quick read of section 107 itself would get one that far.

The real problem, however, is that this should not have been decided as a fair use issue. In the two cases cited above, there was a substantial amount of material that was actually copied from an original into the new work. In the case of the “Wind Done Gone,” specific dialogue was reproduced, with commentary and perspective from the “new” protagonist. In the case of “Coming Through the Rye,” there seems to be [no evidence of actual expression that is copied](#) in the sequel. Judge Batts focuses her [objection on the conclusion](#) that “Holden Caulfield is delineated by words” and that therefore Holden is copyrighted. But this ignores the fundamental distinction between expression, which is protected by copyright, and ideas, which are not. All ideas are delineated by words, but that does not give the ideas themselves, even the idea of a solipsistic teenager who inevitably grows up, copyright protection. Even before she reads section 107, Judge Batts needs to read [section 102\(b\) of the Copyright Act](#).

Indeed, her decision is so unaccountable that it leads this [commentator at TechDirt](#) to question whether there really is an idea/expression dichotomy in copyright law at all. But that dichotomy carries a lot of weight in US law; it is frequently cited, including by the Supreme Court, as one of the basic concepts (along with fair use) that keeps copyright law from becoming an infringement of free speech. Now that Judge Batts has read the distinction out of the law (or failed to read the law at all), the conflict

with free speech becomes all too apparent, when a new book can be banned in the US because an old author doesn't like it.

So what good can come from this ridiculous decision? First, it should be, and very likely will be, overturned on appeal. But more importantly, it should prompt Congress to look again at the exclusive right, granted in copyright law, to prepare derivative works. That right has not always been part of copyright; [there was a time](#) when even abridgments and translations were held not to infringe on an original. The pendulum has now swung the other way, and we grossly overprotect some original works from legitimate reuse because we think those new creations are derivative works. As is frequently pointed out, Shakespeare could not have written his plays under today's copyright regime in the US. It is time for clearer definition of what is and, more importantly, what is not a derivative work that is entitled to protection. If outrage over Judge Batts' decision can prompt such clarity, some good might come from this very bad ruling.

# I'm just a bill (and a “sourcebook”)

*Sun, 12 Jul 2009 12:04:23, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Open access advocates (of which I am one) were heartened last month when the [Federal Research Public Access Act](#), known as FRPAA (S. 1373) and not to be confused with FERPA, was reintroduced into the 111th Congress. The bill, which would mandate public access to research funded by many federal agencies, made considerable progress in the 110th Congress, and hopes are high for its passage this year.

One of the major arguments in favor of this legislation is that it would increase government accountability for the way it spends tax dollars, and the Alliance for Taxpayer Access is a major supporter of the bill. They have a nice [summary of the provisions and purpose of FRPAA here](#).

One advantage that now exists for those who support federal access to taxpayer funded research is that we have over a year's experience now behind us with the National Institute of Health's public access mandate for NIH funded research. Although there have been some efforts to undo that mandate (the ironically named “Fair Copyright in Research Works Act” is the most prominent), by and large most people seem to acknowledge the success of the mandate, and it is easier now to imagine extending its reach that it was a year or so ago. In fact, Sen. John Cornyn, in introducing FRPAA (he is a sponsor along with Sen. Joe Lieberman) [specifically referred to the success of the NIH policy when he introduced FRPAA on the Senate floor](#). This is particularly interesting because it is generally thought that much of the hostility toward the NIH mandate comes from a turf war between the Appropriations Committees and the Judiciary Committees over who has jurisdiction over such mandates; since Sen. Cornyn is a member of the Senate Judiciary Committee, that turf war ought not to derail FRPAA. And [this list of Higher Education leaders](#) who have supported FRPAA in the past (including my Provost) is testimony to the sense in the research community that better access to these funded works will advance research and teaching.

For supporters of open access, another tool was unveiled in the same week that FRPAA was reintroduced — [OASIS \(the Open Access Sourcebook\)](#) — that should make their tasks much easier. OASIS is a website developed by Alma Swan and Leslie Chan to serve as a portal for educational materials. A quick look through it suggests it will be tremendously helpful for those who want to understand the complexities of open access and to explain its meaning and various manifestations to others. The resources are divided to make it easier to finding material relevant to different sets of stakeholders — students, researchers, administrators, publishers, librarians and the public. One particularly valuable contribution made by OASIS, in my opinion, is the set of “[briefing papers](#),” which are documents intended to convey essential information on selected topics in the space of two sides of a sheet of paper. Four briefing papers are available as of now, and there is the promise of more to come. Overall, this site will be a wonderful resource for all of us as we explain and advocate for open access; it will become hugely helpful when the time comes to explain the FRPAA mandate, after it is passed by Congress.

# “Not really a settlement at all”

*Fri, 18 Sep 2009 14:27:19, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

The hearings last week before the House Judiciary Committee about the proposed settlement in the copyright infringement lawsuit over the Google Books project once again showed the disparate opinions that the proposed settlement has generated. There is a [NY Times report on the hearings here](#).

One of the most interesting features of the hearing was the [statement by Marybeth Peters, the US Registrar of Copyrights](#). This was the first time the Copyright Office has really weighed in on the settlement, and I think many were surprised by the strong opposition Ms. Peters expressed. I had to nod in agreement when I read her statement that the Copyright Office had come to realize that “the settlement was not really a settlement at all” but was, in fact, a mechanism to create a new and exclusive business model for Google. A class-action settlement, as Peters points out, usually resolves claims over past acts and provides some remedy going forward. An example would be a suit brought by consumers over a flaw in a car design; the usual remedy would be a financial penalty and a commitment to repair the flaw. In the Google case, however, the alleged infringement will be allowed to continue, with the blessing and financial participation of some percentage (but not all by any means) of the rights holders whose rights have allegedly been infringed.

Perhaps the widely divergent interpretations of the settlement agreement are due to the fact that it does not so much settle past wrongs as project a new business model into the future. This begs people to evaluate the predicted consequences and to base their judgments on those predictions, rather than on a clear view of how past actions will be remedied. A recent blog post entitled “[The Google Books Settlement — What Did You Choose?](#)” confirms this sense of an either/or choice to be made — either love it or hate it. Balancing Registrar Peters’ negative opinion, in this worldview, is this [editorial from The Economist](#) endorsing the settlement.

If you read the two contrasting opinions, it seems like they are talking about complete different projects. Is Google creating a universal library where the whole world can access the wisdom of the ages, or is it a massive power and money grab by an overly ambitious company willing to corrupt the US legal system to gain its ends? The interesting thing about this stark choice, however, is that both opinions may well be true.

It is important to remember that there are limits on the judge’s power in assessing this settlement. His role is to determine the fairness between the parties before him, not to decide if the settlement is good for society as a whole. And, of course, there will not be any party to the lawsuit who will oppose the settlement or appeal its approval, since a major effect of the deal is to align the economic interests of plaintiff and defendant. Only, I suspect, a negative report from the Department of Justice (on the anti-trust issue, which is possible) or a threat of Congressional intervention (which is apparently unlikely) might interfere with approval of the settlement, and then the question arises “what next?”

In her statement to the Judiciary Committee, Peters did go on to acknowledge some positive aspects of the settlement, specifically the creation of the books Rights Registry, access for people who are blind or print disabled, and the ability of libraries to offer “immediate, unfettered and risk-free” access to millions of copyrighted works. Those aspects, she said, “should be encouraged under separate circumstances.” But that, of course, is the \$64,000 question. Under what circumstances, short of a compulsory license, would these advantages be possible? If a class action suit is not the way to create

such a license (and I agree that it is not), how else could it be done? I find myself wondering if Registrar Peters was really asking the Congress to consider addressing the orphan works probably in a new way — through a compulsory licensing mechanism rather than a remission of damages. If we really want the benefits of the Google Books Settlement without the monopoly it would create, it would probably take such a legislative revolution to get it done.

UPDATE — shortly after this post was written, it was announced that the Justice Department has filed with the court recommending that the agreement NOT be approved as it stands. See a [story on the filing here](#).



# I can't define it, but I know it when I see it

*Tue, 13 Oct 2009 08:09:59, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: licensing]*

No, the title, a paraphrase of a [famous remark by Justice Potter Stewart](#), does not refer, in this instance, to pornography, but to non-commercial uses of copyrighted works.

One of the persistent criticisms — or perhaps reservations is the correct word — about the Creative Commons licensing scheme has been that one of the major terms used in CC licensing — non-commercial use — is too vague and subject to varying interpretations. The core purpose of the [Creative Commons](#), of course, is to allow copyright holders to license their works in a way that assures subsequent users that they can make use of the works within defined parameters. Two of those parameters are attribution, which is protected by CC licenses even though not adequately ensured under U.S. copyright law alone, and, often, a restriction to non-commercial uses. But if there is no agreement on what it means to call a use non-commercial, then there is a real problem with the licensing scheme; it would fail to provide that assurance, which reduces the need for transaction costs involved in seek permission, that is its basic purpose.

Now the Creative Commons has released a voluminous report it commissioned to study this potential problem. Although “[Defining Noncommercial](#)” is a massive document that I have not read in its entirety, it is clear from the executive summary and a perusal of the survey data that the situation is not really as serious as some feared. The report suggests that although a comprehensive definition of noncommercial remains elusive, there is not a major problem with its use in CC licensing. Basically, most people seem to agree that “they know it when they see it.”

Two specific findings in the report struck me as particularly supportive of the continued use of “non-commercial” as a licensing term. First, the marketing firm that did the research found that there was broad agreement on what non-commercial meant. Most creators and users agreed that a use that made money for the user or involved advertising was commercial, while those that did not, were not. This broad agreement helps explain why the millions of items licensed under CC licenses have generated so little litigation in the eight years since its founding.

Even more interesting was the finding that showed that when creators and users disagreed about whether or not a use was commercial, it was the **users** who were more likely to err on the side of seeing a use as commercial, and thus not covered by an “nc” license. The reason this is such an encouraging finding is that it suggests that users will ask permission in doubtful cases, even when the creators (who hold the rights) do not think permission is needed in the particular situation. Thus CC licenses can reduce the transaction costs involved in seeking permission, but they will not eliminate all need for permission and users are likely to ask when they are in doubt. CC licensing, of course, facilitates asking permission as well, since works so licensed will have an identifiable rights holder.

This finding is consistent with our experience at the Duke University Libraries, where we placed most of our web pages under a CC license over two years ago. We still do receive some requests for permission, even for pages that carry the CC license. I try to inquire about why people are asking when the page carries a prior permission that almost always covers the proposed use. Invariably I am told (mostly by other librarians) that they consider asking both the cautious and the courteous thing to do. So while we believe that the license empowers many users and reduces transaction costs, we also see that users

who are in doubt feel free to contact us for clarification. This confirms that the non-commercial term is not the problem that some have feared.

Creative Commons has always striven to make its licenses effective and useful, and this study is one more tool for understanding how those licenses are and can be employed. The CC itself suggests three lessons that we can take away from this study:

the findings suggest some reasons for the ongoing success of Creative Commons NC licenses, rules of thumb for licensors releasing works under NC licenses and licensees using works released under NC licenses, and serve as a reminder to would-be users of the NC licenses to consider carefully the potential societal costs of a decision to restrict commercial use.

Good advice, available for those who want to be sure that, in regard to non-commercial use, we “know it when we see it.”

# Technological neutrality as a rhetorical strategy

*Sun, 18 Oct 2009 15:38:01, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

There has been some really good attention paid recently to the issue of how our linguistic choices really frame the debates about copyright law and, often, prejudice them. In his [new book](#), William Patry (who will be speaking at Duke Law School on October 22) devotes quite a bit of space to analyzing the language of moral panics and the metaphors employed by the copyright industries to skew an honest debate. In a June 2009 article called "[Why Lakoff Still Matters: Framing the Debate on Copyright Law and Digital Publishing](#)," Diane Gurman makes a similar plea for those who oppose the ever-expanding reach of copyright to create their own frames that would balance the rhetoric of theft and piracy.

Although it is often easy to spot the linguistic excess coming from the copyright industries, a recent letter to the Senate Judiciary Committee from the National Music Publishers Association took a more subtle, and even more dangerous, approach. There is a [CNET news story about this letter here](#). The theme of the letter, that copyright law should be technologically neutral, seems benign enough, but the work that the music publishing industry tries to get that rhetoric to do is very troubling. The thrust of this "technological neutrality" appeal is a claim that music publishers should collect a fee for a public performance of a musical composition every time there is a digital download of a piece of music.

To call this grasp at a wholly new income stream "technological neutrality" shows amazing nerve; it is really the opposite of such neutrality. Music publishers do not collect a public performance fee when a CD is sold because there is no way to prove or assume that a public performance (as opposed to a private one, over which rights holders have no control) will take place. Why should a digital download be different?

Fred von Lohmann of the Electronic Frontier Foundation, who is quoted in the article, suggests that this is just a turf war between different rights societies over who will collect a fee and, hence, get a "cut." He is surely right about that, as he is when he points out that copyright law has never been technologically neutral. Some exceptions (such as the section 108 library exceptions) apply only to certain technologies or treat different technologies differently. There is a special rule, after all, for digital audio tape. But pointing out the triviality of this use of "technological neutrality" may not be enough. We should notice something really pernicious that is happening behind this smokescreen.

The language of copyright neutrality has quite a bit of appeal for copyright policy makers. The fantasy of a law that adapts automatically to new innovation appeals to a legislative sense of economy. That attraction is being used, in this letter, to attempt to vastly expand the scope of the exclusive rights protected by copyright. And this is not the first time. We should remember that copyright owners do not get absolute control over their works, only control within the scope of the enumerated rights.

A single line in the CNET story really encapsulates the problem here — "composers, songwriters and publishers are asking for a guarantee that they will get paid for a public performance even if there isn't a public performance." In this letter, the apparently benign call for technological neutrality is being used to disguise an attempt to enlarge beyond all reason the scope of the public performance right. This is not the first effort to use that right to expand the reach of the copyright monopoly. As I wrote about [here](#), the debacle regarding the Kindle text-to-voice feature was based on an attempt to expand "public"

performance deeply into the private use of new technologies. For another example, see [this report](#) on the unsuccessful attempt recently by music publishers to collect a fee for every ring-tone “performance” of copyrighted music. So the desire to expand the reach of copyright control is well-established, what changes is the disingenuous rhetoric behind which these efforts are hidden.

# Open access for hardware?

*Sat, 24 Oct 2009 07:38:16, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: technologies]*

Jon Kuniholm may not have been an obvious choice for an Open Access Week speaker at Duke, but as the final participant in a panel on global access to health information yesterday, he made a profound impression. The panel, called “Open Access, Local Action,” was all very interesting to the 30 or so staff, students and parents who gathered to listen (it was also listed as an event for Parents’ Weekend), but I want to focus on Jon’s presentation for this post because what he had to say was mostly new to me.

Jon is a Ph.D. candidate in Biomedical Engineering at Duke and a U.S. Marine Captain (Ret.). He is also an amputee, having lost his right arm in Iraq four years ago, and is thus a researcher with a personal interest in prosthetics. He talked to us about why the money the government spends on R&D for prosthetic research does not produce the kinds of progress that it ought — the lack of coordination and such a small market that there is little incentive to move from workbench to marketplace once the research money is spent. Jon offered potential solutions for this lack of progress that addressed both his very specific research and the broader problem of intellectual property restrictions.

In the very specific area of his own work on arm prosthetics, Jon envisions a remarkable collaboration, made possible by open hardware. He would like to make the hardware being developed to improve neural control of prosthetic arms open and offer it to researchers in the video game industry. His hope is that work undertaken to create new video game controllers (an area with a much larger market and much more money to spend) will also speed the development of better artificial arms, which has been largely stalled for quite a few years.

This is a remarkable vision, I think, of a win-win collaboration that would be founded on open sharing of technological development. Openness, as some have been pointing out for quite a while, can breathe new vitality into innovation, in spite of claims from some industries that free access can only stifle and discourage it. More information about the video controller project can be found at [http://openprosthetics.wikispot.org/Open\\_Myoelectric\\_Signal\\_Processor](http://openprosthetics.wikispot.org/Open_Myoelectric_Signal_Processor)

Jon Kuniholm does not stop with this vision of collaboration, however. He has a concrete and well-informed notion of the mechanisms needed to bring it about. I spoke with him briefly before the event about the intellectual property issues involved with this idea. He pointed out that hardware can be shared openly from its inception because patent protection, unlike copyright, is not automatic and is, in fact, quite costly to obtain. Where copyright does cover a work, regarding plans and specifications, for example, Jon advocates using the open source GPL, or General Public License. The problem with open hardware, however, would come if another party saw profit in the hardware and filed its own patent application. Since patent restricts the use of an idea, this would halt all other development based on the same hardware unless license fees were paid. Since patents in the US law are granted to the first to invent (rather than the first to file a patent application), it would be possible, but very expensive, to fight such following-on patents. Jon’s suggestion here is that the open hardware movement create mechanisms to publish what is called “prior art” — the science that leads up to new developments — in ways that will be very obvious to patent examiners. The hope is that the ready availability of prior art will prevent patents from being issued that could shut down the kind of collaborative work based on open hardware that Jon and many others both need and foster.

# Through the copyright looking glass

*Thu, 29 Oct 2009 09:21:49, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation]*

It is getting both monotonous and annoying to write repeatedly about badly reasoned court decisions in the area of copyright. Unfortunately, when they directly impact higher education, we cannot ignore these pernicious errors by our federal courts.

Earlier this month, a [district court in Michigan handed down such a decision in yet another “course pack” case in that state](#). There was a twist this time, however, which the court chose to ignore. In this case, brought by Blackwell, Elsevier, Oxford, Sage and John Wiley publishers, the copy shop received photocopied course packs from professors, then handed them to individual students who made copies for their own use. Amazingly, the court found that this practice constituted **direct** infringement by the copy shop of the copyright holder’s exclusive rights of reproduction and distribution.

The problem, of course, is that no employee of the copy shop took any action that actually implicated either of these rights. The shop, owned by Excel Research Group, actually made no copies of any of the material over which the suit was brought. Judge Avern Cohn contemptuously dismisses this point, asserting that “the fact that the students push a button on a copier in the manner described is of no significance.” But such facts are exactly what are significant in legal reasoning, and the judge offers no principled reason for ignoring this fact other than his apparent desire to see the plaintiffs win their case.

Even more troubling was the treatment of the distribution right, which the court said was infringed by the shop handing out the course packs it was given. For this to be true, those copies would have to be unlawfully made, so that the doctrine of first sale did not apply to them. But Judge Cohn made no such finding; he simply noted that the packs were brought to the shop by professors who assigned the readings to their students. Again, the judge seems disinterested in either the details of the law or the facts before him; he simply appears anxious to arrive at the conclusion he thinks is desirable.

This startlingly bad reasoning serves a purpose for both the court and the publishers, of course. It is the only way, albeit one that requires ignoring both law and facts, to hold the copy shop liable without also saying that the copies made by faculty members and students were themselves infringing. The shop’s liability, if any, is clearly contributory to direct infringement by students and their instructors. But the court did not want to hold this way, and I am sure the publishers did not ask them to. To find direct infringement would be so obviously to attack the basic necessities of education, and would so clearly contravene the intention of Congress when they included “multiple copies for classroom use” in the list of examples of fair use, that it was too politically dangerous. And publishers would fear, no doubt, a decision that would suggest to their customers that their products truly are unusable. So rather than find direct infringement by teachers and students so as to hold the copy shop indirectly liable, the court rendered an incoherent decision in which Excel is held liable for directly infringing copyright without making a single copy.

There is some excellent analysis of this decision by Peter Hirtle [here](#) and by Shourin Sen [here](#).

The result of this case is similar to what we have been decrying for some time now — a creeping expansion of the exclusive rights in copyright way beyond the boundaries Congress set for them. Here that expansion has been abetted by a judge who apparently sees his role as a kind of knight-errant, righting every wrong he perceives, regardless of the legal foundation.

# Copyright should be an author's right (part 1)

*Wed, 04 Nov 2009 11:59:11, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

It seems like such a simple point. And the rhetoric of authors' entitlement to the fruits of their labors has always been prominent in copyright debates, although it was usually on the lips of printers and publishers whose real concerns were much different. Two very different articles have once again led me to reflect on the importance of keeping authors (broadly defined as anyone who actually creates the intellectual property that is subject to copyright) at the forefront of copyright discussions and decisions.

First there are these stories about file-sharing of scholarly articles amongst medical researchers — one from the [Chronicle of Higher Education here](#) and the other from [Techdirt here](#). The Chronicle is particularly scolding in its tone, and it evokes the misnomer "piracy" in its title. But aside from that commonplace rhetorical strategy, I want to emphasize two points raised by these reports.

First, the estimate of how much money journal publishers would lose by this practice, which the Chronicle sets at \$1.4 million per year, should be taken with a ton of salt. As has become very well known in recent times, these estimates are usually built on false assumptions. The recording industry, for example, often assumes that each unauthorized song download costs the industry the full price of a CD. But there is no reason to believe that that is true; the consumer might be unwilling to pay for an entire CD to get one song and prefer to forgo the music altogether or pay to download a single track if the free option were not available. Likewise, an article shared over a peer-to-peer network does not translate to a lost subscription or even, necessarily, to a lost per-article fee. We just do not know how much access would be worth to a consumer, and the copyright monopoly has prevented us from ever getting reliable market data.

Second, we should remember that there is a big difference between music file-sharing and the swapping of academic journal articles. In the latter case, academics are on both ends of the transaction; they are the authors as well as the consumers of the articles that are exchanged. If it were not for the academic practice of giving away copyright to publishers, this would be no big deal at all. Because of the lack of a financial incentive for academic authors, file-sharing of academic articles causes no economic loss to producers. What makes it newsworthy, and, from the academic point of view, necessary, is that copyright is held by entities other than the authors. By transferring copyright wholesale, instead of granting temporally-limited licenses to publish, academic authors have helped create the access problem they are now trying to solve with file-sharing networks. That doing so is potentially an infringement of copyright is evidence of how harmful this practice has become to the fundamental mission of colleges and university.

And this gets me back to the point about copyright as an author's right. For copyright to function, it must serve the needs of creators; if it does not, its fundamental purpose, which is to create incentives that encourage authorship and other forms of creative expression, is defeated. When academic authors give away their copyrights, and then have to resort to "illegal" file-sharing to get access to fundamental research, the copyright system has broken down. Only by reclaiming their copyright entitlement can academics solve this problem.

In a few days I will look at this problem of copyright as an author's right from a very different perspective, based on an article about the finances of F. Scott Fitzgerald.

# Copyright should be an author's right (part 2)

*Mon, 09 Nov 2009 10:39:53, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation]*

As promised in the last post, here is a very different look at the copyright incentive and the need to be thoughtful and cautious when we talk about copyright as an author's right.

In the Autumn 2009 issue of *The American Scholar*, William J. Quirk writes an absolutely fascinating reflection on the finances of F. Scott Fitzgerald, whose tax returns and yearly financial ledgers were preserved and form the basis for Quirk's essay called "[Living on \\$500,000 a Year.](#)"

The essay will be of interest to many people who are not obsessed with copyright issues, but one line struck my obsession very deeply. According to Quirk, when Fitzgerald died in 1940, "his estate was solvent but modest — around \$35,000, mostly from an insurance policy. The tax appraisers considered the copyrights worthless." Fitzgerald's copyright, of course, were not worthless over time. As Quirk tells us elsewhere, the royalties from the sale of *The Great Gatsby* continue to generate about half a million dollars every year for the trust set up by Fitzgerald's daughter Scottie to benefit her children.

This would seem to be one of the rare cases where the long term of copyright protection (*Gatsby*, published in 1925, will be protected until 2020) continues to benefit the descendants of the author. Usually, of course, copyrighted works have ceased to generate any income at all after only a few years, and those who inherit the rights generally neither know that they hold them nor get any benefit. Fitzgerald, however, arguably presents a strong, if unusual, case for long-lasting copyright protection. But when we look deeper, we see that the incentive that copyright is supposed to provide probably was overblown even in this case.

First, it is not very likely that the knowledge that his writings would make his grandchildren wealthy really played any part in Fitzgerald's decision to write his novels. Indeed, Quirk's essay tells the story of a man driven to work partly by the need to make money to keep a roof over his head from day to day (which is why he wrote short stories) and partly by the need to express himself (which is what he wrote his novels to do). The copyright incentive worked in the short term — it made it possible for Fitzgerald to sell his stories and novels for relatively healthy sums — but all of that incentive was immediate. The thought of riches two generations in the future was no part of what made Scott write.

Also, if the copyrights were considered worthless at his death, it is hard to see how Fitzgerald could have imagined profits for his grandchildren. Even in this case, the incentive argument for an average copyright term of 95 years rests on the absurd assumption that authors can predict future success in the face of present failure (or perhaps that they are even more deluded than the rest of us).

Even if the copyright incentive can work in some cases, of course, it must remain in the hands of the authors. If Fitzgerald had transferred his copyright to publishers, as is common practice today, there is little chance that his grandchildren would be enjoying all of that money, especially since there was a substantial period of time during which no one could anticipate the rebirth of interest in his books. Once again we come to the inescapable conclusion that the justification for strong copyright protection, which is the incentive it provides to authors, is only valid if copyright remains in the hands of those authors. To be effective at all, copyright must be, and remain, an author's right.



# Architectural overreaching

*Fri, 13 Nov 2009 10:50:00, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: user-generated-content]*

This recent post on the TechDirt blog drew my attention (and that of many others) to an earlier note on the Freakonomics blog about an artist who pays an annual fee plus a percentage of his earnings to the University of Texas, Austin for the right to paint pictures of famous UT buildings like the Texas Tower and to use university emblems, even including the burnt orange color scheme.

On TechDirt, notice of this arrangement provoked a lot of angst. Many of the comments expressed outrage at the “fact” that ordinary citizens who have to pay a copyright fee for photographs they take of public buildings, because of the copyright protection afforded to architecture. That this is the state of the law is affirmed by several of those comments. In contrast, the blogger who wrote the TechDirt post in the first place asked a differently focused question — “why should the painter have to pay a fee at all?”

All of the venting in the comments on this blog post reminded me of an [article I have been reading by Professor Jessica Litman](#), about which I shall say more in another post, in which she discusses the “independent threat to the health of the copyright system” that arises from the “widespread perception of the current copyright system as illegitimate.” The outraged comments point up this perception, even though they are largely misinformed. The important question to address in this particular situation is really that other one — why pay a fee at all? — since the answer should allay some of the outrage.

The basic response to the concern for photographers and artists is that the copyright law provides an explicit exception, a limitation on the scope of the right in architectural works, that makes most drawing, paintings and photos of buildings non-infringing. Section 120(a) of the Copyright Act (Title 17 of the US Code) says:

Pictorial Representations permitted — The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing or public display of pictures, paintings, photographs and other pictorial representations of the work, if the building in which the work is embodied or is ordinarily visible from a public place.

So there is no way under copyright law for UT Austin or any other building owner to prevent, or extract fees, for paintings and photographs of such buildings, either because they were constructed before copyright protection extended to buildings (as opposed to just plans) or because of the exception quoted above.

Other types of protection that could allow the extraction of a fee from the artist would usually be trademark issues. University emblems will almost certainly be subject to such protection. The issue of the burnt orange color scheme, however, is much more doubtful, especially after the [decision earlier this month](#) involving a similar issue around an artist’s use of Alabama’s crimson colors in the U.S. District Court for Northern Alabama.

So to return to the question of why the artist should pay this fee, one possible answer, I think, is that he wants to. For paintings of buildings on the public property of the University, such a fee is probably neither required or enforceable, unless there are trademark elements included. But the artist could have entered into a voluntary licensing agreement with the University, perhaps out of a sense of loyalty or fairness. Or, of course, he may just be badly misinformed. Unfortunately, we frequently encounter

situations in which someone asks about a license in a situation where none is required and ends up paying an unnecessary fee. Copyright owners (or putative owners) have little incentive to correct these misapprehensions.

# Writing about reform

*Mon, 23 Nov 2009 08:55:46, ksmithl2@duke.edu, [category: notes]*

Every now and then, a law review article on copyright comes along that is so good that I feel I have to recommend it. I am well aware that most of my readers are neither lawyers nor legal scholars, and the length and stilted format of law review articles can be off-putting. But Professor Jessica Litman is more of a “known quantity” than many other copyright scholars, thanks to her wonderful 2001 book “Digital Copyright.” It is her new article “[Real Copyright Reform](#)” that I now want to recommend for anyone interested in that broad topic.

There are lots of meaty and persuasive discussions of how to right the copyright ship in the US in this article, and it is hard to summarize all of Litman’s insights. I really do hope that the whole article will be widely read, but I want to emphasize two broad points Litman makes for the purpose of this post.

First, Litman suggests that we abandon the division of copyright into seven distinct and separable rights. This division serves us very poorly in the digital age, when all kinds of private uses that were uncontroversial for many years are suddenly contested online. Often the lines between performance, display, reproduction and distribution are simply impossible to maintain in the online environment that makes a new copy for nearly every use. Instead of this increasingly dysfunctional division, Litman proposes a radically simple distinction between commercial exploitation and non-commercial enjoyment.

Besides the obvious simplification that such a new approach to copyright would accomplish, Litman points out another advantage to her proposal — it accords better with the general public’s intuitive understanding of what copyright is for and how it is supposed to work. She correctly notes that a copyright law that is regarding as illegitimate and unenforceable by a majority of the public is of very little use. This proposal for a simplified approach to protection and infringement, based on protecting only commercial exploitation and allowing non-commercial enjoyment, would serve the cause of copyright legitimacy.

The second broad proposal that I want to highlight is Litman’s suggestions for “reuniting creators with their copyrights.” Copyright is frequently defended as an author’s right, but it seldom functions that way. Nevertheless, both logical and economic reasoning suggest that greater efficiency could be had if copyright, or some copyright privileges, remained in authors’ hands. To accomplish this goal, Litman suggests two significant reforms that would give creators more control over the exploitation of their works. First, she suggests that we transform our largely illusory termination right (the right to terminate a transfer of copyright and reclaim the rights after 35 years if a complex procedure is followed) into a simpler process that would be available after only 15 years. Second, she proposes that creators retain the right (“residual authority”) to license uses of their works even after a copyright transfer has been executed, “subject to a duty to account to her assignee(s).” Such a move would simplify the licensing process, give some certainty to those who seek licensed uses, and put the residual licensing authority in the hands of the one most likely to permit and encourage creative reuse.

I have to finish this post with both a plug for my own forthcoming work and an expression of regret. My own article on copyright reform, which is directed to a librarian audience, will be published in January 2010 in [portal: Libraries and the Academy](#). My article will be featured in the issue that marks the tenth anniversary of the journal, and I am very honored to be given that position. But I also wish I had had the advantage of reading Litman’s article as I wrote my own. Several of my suggestions for how to “renew”

copyright focus on returning control to creators, and Litman has done a superb job of both defending the rationality of such reforms and thinking through some creative ways to get there. I have no choice but to resort to that old complaint, "I wish I had said that."

By the way, I will make a copy of my article available on this site as soon as it is published, in keeping with my contractual rights and obligations.

# What are we paying for?

*Fri, 27 Nov 2009 13:45:35, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: licensing]*

As the lawsuit brought by three publishers against Georgia State University claiming copyright infringement in GSU's e-reserves and course management systems wends its way toward what seems to be an increasingly likely trial, it has had an unexpected benefit for academic librarians who manage electronic reserves.

As many people already know, academic copyright expert Dr. Kenneth Crews from Columbia University was named as an expert witness in the case this past Spring. His report on e-reserve practices and argument for broad latitude for fair use is one of the best documents on this subject I have ever seen. Peter Hirtle, of Cornell University and the LibraryLaw blog, performed a tremendous service by posting this report and some other documents from the case on the Scribd web site. I have been reading the documents in the case on the [Justia web site](#), but locating the documents attached to filings there is very cumbersome, so I have never considered linking to them here. Peter showed much more ingenuity and determination than I can muster by providing this easier access to these public documents.

[Peter's post, with links to the various documents, can be found here.](#)

In addition to the expert report, which the plaintiffs tried to exclude from the case, there is also some fascinating material in the "rebuttal expert report" that Dr. Crews filed after the plaintiff's own experts had filed their reports. One of the most interesting discussions in this second document, to me, is Crews' comments on the inadequacy of the licensing market for electronic course readings as it currently exists. In one amazing section, Crews recounts locating an offer to license permission to two of his own works on the Copyright Clearance Center's website. The only problem is that these were works for which Crews had retained the copyright himself, and he never authorized CCC to sell licenses for them. From this small example, he raises the question of how secure those of us who purchase permission for at least some of our digital course content can feel about what we are buying.

I think many librarians rely on the idea that they are purchasing specific licenses for individual works from the Copyright Clearance Center, but I also know that an increasing number of us are concerned that what we are really buying is insurance. As a colleague from another institution put this idea to me, "if we are spending enough money with CCC, it would be a horrible business decision for a publisher to sue us." The real question, of course, is how much money is enough. But in any case, this notion of buying insurance for our e-reserves has never appealed to me, and I am pretty sure it is not the way CCC itself sees the licensing transactions it facilitates; everyone would be happier, I think, to believe we are purchasing legitimate copyright permissions. But by raising the question of whether CCC actually has the right to sell some of the licenses it does sell, Crews makes the situation look more like we are, at least some of the time, paying "protection money" rather than effective licensing fees.

# ACTA up

*Thu, 03 Dec 2009 07:11:51, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip]*

ACTA, short for the Anti-Counterfeiting Trade Agreement, is a multi-party trade agreement being negotiated in secret by the U.S., the states of the European Union and several other nations. While its name suggests a laudable purpose, the prevention of international trade in counterfeit goods, the secrecy of the negotiations raise cause for concern. As details leak out about the contents of the proposed treaty, as such details always do, it becomes clear that much more is happening here than one might suppose. Indeed, these negotiations are being used to undermine the legal system of copyright in place internationally in favor of a one-way system that benefits special interests at the expense (literally) of consumers. The more we learn, the clearer becomes the need for consumer groups and others interested in fair copyright to “ACTA up” in opposition to these negotiations.

Not everyone is happy with the secrecy of the ACTA negotiations. This [news report tells of a letter](#) written by two US Senators to the US Trade Representative, asking that the text of the proposed treaty be made public. They cite privacy concerns, issues involving individual civil rights (such as the right to be free from warrant-less searches and seizures) and fundamental changes to the balance struck by international copyright laws. One major privacy concern is the possibility of border searches, where customs officials would be authorized to look for and seize allegedly infringing goods, even on laptops carried through airports or across borders.

So what else is in ACTA that has Senators Sanders and Brown so incensed? There is a nice, short summary of the key provisions of the US proposal [here on the blog of Canadian law professor Michael Geist](#). But I want to focus on a slightly longer report written about ACTA for the Library Copyright Alliance by Janice Pilch of the University of Illinois. This [Issue Brief](#) nicely explains the context and key provisions being discussed in the ACTA negotiations, and it focuses on the specific concerns of libraries.

Two things particularly struck me in Pilch’s analysis of ACTA. The first is the harm it could do to technological innovation. As is often the case, the US Trade Representative apparently sees himself as an agent for the major entertainment industries, and is willing to sacrifice other, developing business models to the protection of their interests. This is clear in the concern that ACTA will unfairly impose liability for copyright infringement on Internet Service Providers whenever their networks are used to transmit infringing content. ACTA seems to carry a [“three strikes” provision](#) that would require disconnection of Internet users whenever there have been three accusations (not proof) of infringement. The result would, at least, be a loss of business for ISP and a real fear of developing new communication technologies because of the threat of liability for how those technologies are used. Worse, some suggested provisions would encourage ISPs to monitor user content and report suspected infringement. As Pilch notes, the Library Copyright Alliance is asking that ACTA focus on commercial counterfeiting and not penalize particular technologies for the way they are sometimes used.

To me an even bigger concern is that ACTA represents a forum shift in international copyright regulation. When I was in law school, we spent a lot of time discussing how our procedural rules were intended to prevent “forum shopping” — seeking a sympathetic court even if the area in which that court sat had little connection to the issue involved. Forum shopping is often costly and unfair, and US jurisdictional rules discourage it. But in a similar way, the US Trade Representative and the legacy content companies have been forum shopping internationally for a while now. Pilch recounts the way industrialized nations moved toward international forums like the World Intellectual Property

Organization in order to force stronger IP rules on developing nations and are now moving to these multi-party agreements because of the perception that those nations have gained too much influence at WIPO. The goal seems to be to find a way to continue to treat developing nations as markets rather than partners, whose own need for technological innovation and infrastructure development are subordinated to the desire to protect the sales of traditional goods produced by the industrial nations. Such forum shopping also undermines the democratic process, since it uses trade agreements, which do not require legislative approval, to enforce rules the legislature is unwilling to enact into law.

ACTA raises a lot of serious concerns for consumers, fair copyright advocates and those concerned about international development. Like many other similar attempts to make law behind closed doors, this is an effort where sunlight and transparency is badly needed.

# The most dangerous place on the Web

*Tue, 15 Dec 2009 07:27:27, ksmith12@duke.edu, [category: licensing, category: technologies, category: user-generated-content]*

The most dangerous place on the Internet may well be inside that little button that says “I Agree.” The opportunity to bind oneself to a contract almost unconsciously abounds on the Internet, and the immediacy of the Web encourages click-through agreements that are almost never read and, if they are, impossible to understand.

The Electronic Frontier Foundation has provided a nice primer on on-line agreements in this document called [“The Clicks the Bind: Ways Users Agree to Online Terms of Service.”](#) This is a long blog post or, in PDF, a three page document that should be read by everyone who uses the Internet. It helpfully distinguishes major types of online agreements and the relative likelihood that the different forms result in binding contracts. The document, by EFF’s Ed Bayley makes two programmatic assertions, both of which seem unarguable.

First, users should have to take an affirmative step to agree to terms of service. Put another way, terms of service that are there if you want to look at them but do not require even that thoughtless click should not be enforceable.

Second, Bayley asserts that terms of service from online service providers should be publicly available, not just presented as a pop-up as one enters the site for the first time. This would allow public discussion, which is important if people are to get past the habit of clicking without reflection on “I Accept” and come to some awareness of what they are agreeing to. Even when TOS are publicly available, they are not very easy to understand. Over a year ago, I printed out the [TOS for Flickr](#) just as an example and found that, at that time, they ran to over 12 pages of printed legalese. A repeat of that experiment shows that they are shorter now — “only” 10 pages. And to Flickr’s credit, they are available to anyone who wants to see in advance what they are getting into.

Bayley’s short essay is vital information, and the suggestions he makes seem like minimum steps that must be observed if courts are really going to hold individual users to the extensive and complex clauses found in these online terms of service.



# Dissing incentives

*Fri, 18 Dec 2009 08:57:56, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: technologies]*

This New York Times article about "[Legal Battles over E-Book Rights to Older Books](#)" caught my eye both because of a usage I dislike in its title and because of its importance in the continuing discussion of how much incentive copyright really provides for writers and other creators. The article focuses on a dispute between the family of William Styron and Random House, his publisher, over who has the right to profit from e-book sales of Styron's work.

I have to say first that I dislike the reference to "e-book" rights because there is no distinct right to publish an e-book. There are specific exclusive rights within copyright to publicly perform a work and to prepare a derivative work, both of which are important in allowing the creation and distribution of an e-book based on a published novel. But "e-book rights" is a misnomer; at best a short-hand reference to a set of the enumerated rights in copyright that are involved in e-books. In the contract dispute between Random House and Styron's estate, the issue will be the scope of the assignment of these various exclusive rights, not the simple question of who got the "e-book" right since, as the family points out, e-books were unheard of when Styron published his novels and the profoundly moving "Darkness Visible."

This [brief item](#) explains that the actual issue in this case is what "in book form" means in the publications contracts Styron agreed to.

The larger significance of this issue involves e-book versions of much of the great literature of the 20th century. The length of copyright protection imposed on this cultural heritage is usually justified as providing an incentive for writers to write, artist to paint and filmmakers to "shoot." If, as Random House claims in the Styron case, however, the right to exploit new technologies as they develop is encompassed in the original publication contract, this incentive seems even more tenuous than it would ordinarily. Even if we assume that Styron was more likely to write because he knew his children and grandchildren could continue to profit from his books than he would have been if copyright term was shorter, Random House's claim that his original publication contract transferred the right to profit from new forms of distribution seems to reduce that putative incentive. Presumably the family will have less control over the e-book created by Random House than one for which they contract directly (as they want to do), and it seems quite likely that they will profit less, if at all, from a version sold by Random House.

If copyright is really an author's right, as publishing intermediaries like to claim when they want Congress to enact stronger protections, should not the right to decide when and how to exploit new opportunities, not considered at the time of an original transfer, remain with the author or the author's family? In short, publication contracts in copyright should be read narrowly to preserve the incentive for authors and others to create which is the alleged purpose of the law.

This recent article by Professor Rebecca Tushnet about "[Economics of Desire: Fair Use and Marketplace Assumptions](#)" considers the incentive structure of copyright in some detail, based on the recognition that many creators create out of desire, or even compulsion, rather than a direct expectation of the money to be made for them or their heirs. She argues persuasively that the economic incentives that the copyright monopoly creates "largely bypass[es] a persuasive account of creativity." Her conclusion that "Copyright law, and general cultural policy, could do more to direct material rewards to authors if we truly believe that monetary incentives will spur creativity" seems to directly address the Styron e-

book dispute. If we are serious about copyright incentives, she suggests, “we need to keep a close eye on which entities are benefiting material from all these new works.” This is precisely the case with e-books and the literature of the 20th century; disputes like this raise real questions about how genuine our commitment to copyright as an incentive for creativity really is.

# The textbook world is getting flat

*Wed, 23 Dec 2009 07:26:21, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies, category: user-generated-content]*

Earlier this month I was able, thanks to the organizing efforts of a colleague, to participate in a phone call with Jeff Shelstad, one of the founders of [Flat World Knowledge](#). I wrote about Flat World some time ago, but I want to take the opportunity (before it fades in my mind) to describe their business in more detail, provide an update about their success and recommend their business model as a genuinely transformative opportunity for higher education.

Flat World Knowledge is essentially a publisher, founded in 2007 and currently focused on the market for “big” textbooks — the ones that cost students an arm and a leg and are issued in a new edition every other year to undercut second-hand resales. Flat World, in contrast, is publishing their textbooks online, entirely open and free. The books are licensed under a Creative Commons license. Like other publishers, Flat World organizes peer-review for the books it publishes and provides copy editing and design services. So two issues come to mind immediately — how do they make money, and what is in it for faculty who might write or adopt a Flat World textbook. It is the answers to these questions that really make Flat World such an exciting venture.

First, although students can get free access to their online textbooks (through course-specific URL; more about this in a minute), they also can buy the textbook in several different formats (print, audio and self-print PDF, according to the [“How it works”](#) page). According to Mr. Shelstad, about 50% of students currently opt to purchase a book that has been adopted for their course (at 29.95 for a print-on-demand copy), and Flat World plans to increase that percentage as they add new or improved formats. Shelstad mentioned formats for hand-held devices, for example, and it seems exciting to me just to know that a textbook publisher is thinking this way.

For faculty who publish textbooks with Flat World, there is an opportunity to earn royalties on every dollar that is spent on their book, as well as the chance to continually update and correct the text. These authors have a level of continuing control over their work that is unprecedented in the print world.

A unique level of control is also the principal advantage that faculty who adopt a Flat World textbook gain, since they are able to adapt a book for the specific needs of a course they are teaching. Currently, adopting faculty can move sections of a book around with up / down / delete controls and annotate any portion. Tools to insert materials and to edit at the word level are in development. Once a faculty member has adapted and adopted a specific textbook, that version is saved and a course specific URL is created so that students in the class will see exactly the book that has been created, in a collaborative way, for their use.

I was especially interested in how these two different control points — that of the author and that of the adopting instructor — might relate. I was delighted to hear that the adapted version will be separate from the original, using this system of unique URLs, and that all changes in the adapted texts will be indicated. This seems to me to be a very sensible way to preserve the integrity of the original authored work while still permitting adaptation for a particular need.

Flat World is showing signs of being a genuinely transformative model for higher education. They currently have 11 textbooks in their catalog, with 10 more to be added in the coming months. Even with

that relatively modest catalog, there are already over 500 course adoptions and more than 40,000 students using Flat World books. The staff at Flat World is working on new ways to adapt the books, such as pulling in images, PowerPoint, etc. It was heartening to hear that one of the reasons roll-out of these features is slow is that Flat World does not want to compromise the high standard they have for design of their books too radically.

Overall this is an exciting model that helps us look forward to the genuinely new ways technology can facilitate classroom and online education. Just after our phone conversation, [this new announcement](#) came out about Flat World's partnership with Bookshare that will make textbooks available to people with print disabilities, highlighting yet another possibility for this adaptive technology.

# Taxing culture

*Fri, 01 Jan 2010 10:17:18, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain]*

Happy New Year to all.

January 1 is traditionally Public Domain Day, in addition to being a day for parades, bowl games and hangovers. That is because most copyright laws stipulate that all copyrights the term of which would expire throughout a particular year actually expire on Dec. 31. Thus, on January 1, lots of works should enter the public domain. In Europe, January 1, 2010 sees free public access to the poetry of William Butler Yeats and the works of Sigmund Freud. But here in the U.S., the gerrymandering of our law over the past decades has resulting in almost no new works in our public domain.

There is a great [web page on Public Domain Day 2010 here](#), from the Center for the Study of the Public Domain at Duke's Law School.

I am particularly struck by the quote on the CSPD page that reminds us that we are the first generation of Americans to deny ourselves access to our own culture. Almost nothing created in our lifetime will be available to support new creation and innovation by us. If we are not vigilant, these works will be denied to our children and grandchildren as well. Nothing except some unpublished works will enter the US public domain through expiration of the copyright term until 2019, and possibly later than that, if the term is extended retroactively again.

These reflections demonstrate very clearly that copyright protection really is, as Lord Macauley said many years ago, a tax on the public. We continue to pay higher prices for works by Yeats, Freud and thousands of others because copyright prevents free market forces from operating. We must seek permission, often from descendants who do not know nor care about the control they hold, to make new works based on old. All these costs are imposed on us by the government, which grants the copyright monopoly ostensibly for the benefit of authors. But there is no sign that the descendants of Freud or Yeats are benefiting from this absurdly long protection in the US. Only intermediaries continue to make money, because they do not have to compete in a free market but can charge the public monopoly prices.

Perhaps when the next proposal to extend copyright's term comes before Congress, we can be intentional about labeling it what it really is — a tax that benefits private interests at the expense of the public. If its impact was clearly understood, it would be much harder for Legislators to vote for the copyright tax.

# Let the user beware

*Mon, 11 Jan 2010 09:57:37, ksmith12@duke.edu, [category: licensing, category: technologies]*

If the box that says “I Accept” (regarding a website’s terms of use) really is [the most dangerous place on the web](#), as I wrote several weeks ago, it is getting even riskier out there. For a long time, a relatively safe rule-of-thumb has been that EULAs (end user license agreements) that forced you to see their terms were enforceable, while those that merely offered you a chance to see them by clicking on a link you did not have to follow were not. That has never been a hard-and-fast rule, and its utility has been seriously eroded by several court cases in recent years.

The most recent case involved a challenge to a “choice of forum” clause contained in the EULA for a site called ServiceMagic. A lawsuit by Victoria Major was dismissed because it was filed in Missouri while the EULA says that all lawsuits must be filed in Colorado. The Missouri Court of Appeals upheld the dismissal, even though Ms. Major never read the EULA nor was forced to see it and click “I Accept.” The court held, as have several others in recent years, that the link was placed prominently enough for the terms to be enforced, even though there was no technological requirement to actually click through the license. Some details about the case can be found [here, on ArsTechnica](#).

There was an uproar several years ago about a proposed change in the Uniform Commercial Code called [UCITA \(the Uniform Computer Information Transactions Act\)](#) that would have made it too easy, its opponents felt, for consumers to commit themselves to licensing terms about which they had no knowledge and no chance to negotiate. UCITA was adopted only in Maryland and Virginia, and it has since been withdrawn by its sponsors. But the goal of UCITA to speed up Internet commerce by simplifying licensing, even at the cost of consumer protection, is being accomplished by courts around the country anyway. This latest case is one in a line of similar cases that make it even more imperative that users look for and read licensing agreements, even if the site itself does not force them to do so.

There are a couple of caveats to this trend. First, it is not universal. A similar case against online retailer Overstock, [reported here](#), went the other way, apparently because the link to the terms was not sufficiently prominent. And in the ServiceMagic case one judge on the appeals court wrote that she would only uphold reasonable and expected terms like choice of forum, not terms that were “unconscionable.” So perhaps we can expect a more active review of licensing terms when the license is merely a “clickwrap” or “browsewrap.” Nevertheless, the most important caveat raised by these cases may also be the oldest — “[caveat emptor](#).”

# An amusing chance to review some key ideas

*Fri, 15 Jan 2010 08:33:38, ksmith12@duke.edu, [category: notes, category: copyright-issues-and-legislation]*

There are probably many readers out there who know who Vanessa Hudgens is. I did not, until I saw some blog posts reporting on her ongoing lawsuit against website owners who apparently posted nude photos of the actress and singer without her permission; see [this report](#) (without the pictures) on the TechDirt site. Not, I admit, a serious issue of scholarly communications, but it does offer a chance to review some key points about copyright law about which there seem to always be questions and confusion.

First, the subject of a photograph does not have a copyright claim in the picture. As the post linked to above points out, this has some counter-intuitive results. One of the best photos of my wife and I together taken in recent years was snapped by a stranger we met in Istanbul who asked me to take a picture of he and his new bride and then returned the favor. Oddly, he has a copyright claim in photo on my wife and I while I would have a claim in the picture of him, on his camera. This is a result of the automatic nature of copyright protection, which showers down on a creator as he or she creates. No such right in copyright accrues to the person whose picture is taken. In the case of Ms. Hudgens, who is suing for copyright infringement, the ability to make that claim depends on the asserted fact that she took the photos herself, using a cellphone camera. Were they taken by another person, Ms. Hudgens would not have any copyright claim.

This brings us to the need to distinguish copyrights, which are granted and enforced by federal law, from a right of publicity, which is a state law claim. Merely as the subject of these photos, Hudgens might still have a claim that her right of publicity has been infringed, even if she had no copyright claim. There could be a dispute about whether posting these pictures to a website was a commercial use, which is usually necessary to trigger the right of publicity, but I suspect that the website sells advertising and expected the photos to drive up both hits and revenues. So posting the pictures might well have been the kind of use that would violate Vanessa's right to control commercial use of her image (as well as other privacy rights, perhaps).

This need to distinguish between the owner of a copyright interest in a photograph (the photographer) and the owner of the publicity right (usually the subject) is the first lesson we can tease out of this case.

There are other ways a subject might get a copyright interest in a photograph, by the way. First, the photo might be a work made for hire. In that case, the employer owns the copyright from the start, and the employer might well also be the subject of the photo. But just paying for a photograph does not make it a work for hire; the photographer must either be a regular employee of the employer/subject or an independent contractor who explicitly agrees in writing that the work will be a work for hire. Alternatively, the photo might be a derivative work based on a copyrighted work that is part of its subject. Suppose an artist poses in front of one of her paintings, or that Vanessa Hudgens had been wearing a dress she had designed herself (clearly counter-factual). In those cases, the subject would have a copyright interest in the photo because of the derivative representation of an original work.

Finally, we can also take from this case a reminder about the role of registration in copyright protection. The blog post notes that it is "odd" that these photos are registered with the Copyright Office if they really were private self-portraits, as claimed. Not really. We should remember that registration is not required for protection — copyright is bestowed automatically as soon as the pictures were snapped —

but it is required to bring an infringement action into court. Thus it is perfectly possible to hold a copyright, have it infringed, then go and register that right before bringing a lawsuit. In fact, a quick review of the Copyright Office's records suggests that this was the case here, since the registration data of the photos is October 2009. If one follows that sequence of events, the range of damages is limited, since statutory damages are not available. I suppose, however, that if copyright was registered before the infringement took place (and thus statutory damages are sought), one might well doubt the assertion that the photos were intended to be private.



# ScienceOnline and copyright anxiety

*Thu, 21 Jan 2010 07:28:08, ksmithl2@duke.edu, [category: authors-rights, category: copyright-in-the-classroom, category: open-access-and-institutional-repositories]*

I attended parts of the [ScienceOnline 2010 conference](#), held here in the Research Triangle this weekend. There was a fascinating array of topics discussed and an interesting crowd of 270+ that included many working scientists, librarians and even journalists. It was a great opportunity to listen to scientists talk about how they want to communicate with one another and with the general public.

There are some excellent discussions of what went on at this year's conference, especially [here](#) and [here](#) on Dorothea Salo's blog. Those with a real passion for more information can check out this [growing list of blog posts about the conference](#). I won't try to compete with these comprehensive recaps, especially because my selection of events to attend was rather idiosyncratic, and perhaps even ill-advised. But I do want to make three quick observations about what I personally learned from the conference.

First, I discovered one more argument for open science that had not occurred to me before, but has the potential to be very compelling for scientists on our faculties. One reason academic research should be online is that "junk" science is already there. If the general public — including the proportion thereof who vote or require health care — do not make good decisions in regard to matters involving scientific knowledge, we can only blame ourselves when the best research is not available to them, hidden behind pay walls.

Second, I was fascinated to discover that health science bloggers have developed a [code of ethics](#) to try and account for the many issues that arise when scientists put important and potentially life-altering information onto the open web. The benefits of this openness are indisputable, but so are some of the risks. This code of ethics represents an attempt to address some of those risks and minimize them (there is a somewhat different discussion of a similar issue from the conference [here](#)). The criteria applied to evaluate health care blogs (see the [text of the code](#) itself) — clear representation of perspective, confidentiality, commercial disclosure, reliability of information and courtesy — encapsulate standards that all of us who try to share information and opinion online need to be aware of.

Third, I was amazed at how important, and problematic, copyright issues were to this group. I attended seven sessions at the conference, and five of them dealt with copyright as a major (although often unannounced) topic of discussion. Even recognizing my tendency to gravitate toward such sessions, this is a high percentage. I asked a fellow attendee why so many sessions raised copyright and was told, albeit with tongue in cheek, that it is "ruining our lives." More seriously, one scientist described trying to put his classroom lecture slides online and being told by his university's counsel that all material that he did not create had to be removed first. Apparently there was no discussion of the applicability of fair use and how to decide what was and was not allowable; just a wholesale rule that would discourage most scientists interested in sharing. This suggested to me that it really is very important to improve the quality of copyright education on campus — for faculty, librarians (who are often the ones asked for advice) and even legal counsel. We cannot reasonably advocate more online open access unless we also give our scholars the resources to accomplish that goal. In many ways the technological infrastructure is becoming trivial and it is the policy and legal questions that must be addressed directly if we really want encourage openness.

# Can we stream digital video?

*Wed, 27 Jan 2010 10:51:43, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: technologies]*

I had not even had a chance to open my daily e-mail from Inside Higher Ed yesterday before four colleagues had sent me a [link to this story](#) about an educational video trade association forcing UCLA to halt its practice of streaming digitized video on course Web sites. Several suggested that I would surely want to blog about the story, and they were, of course, correct.

The story contains some chilling rhetoric from the representative of the Association for Information and Media Equipment — intentional, I am sure — about their plans to investigate and threaten other colleges and universities that are doing the same thing. Many schools, of course, have explored these options because the pressure from faculty and students to provide greater digital access to our film collections is intense. Some have concluded that the legal risk is too great and are resisting that pressure, at least for now. Others have tried various justifications, clearly hoping to “fly under the radar.” This story will certainly strike fear into many, and will give more ammunition to faculty members who complain that copyright law prevents them from teaching effectively in the media-saturated world of 21<sup>st</sup> Century America.

In response to the story, I want to suggest here what the major alternatives for legal streaming of digital video might be and the problems inherent in each alternative. I know from conversations with colleagues that each of these strategies is being tried somewhere.

The first, and most obvious, possibility is to rely on the TEACH Act, which amended one of the Section 110 exceptions to the public performance right in copyright in order to allow “transmissions” of certain performances for distance education. TEACH (or Section 110(2)) has a lot of specific requirements that must be met (see this [TEACH ACT toolkit from NC State University](#)), although many of those requirements would appear to be satisfied when digital video is streamed through a closed-access course management system. The real problem with relying on TEACH is the portion limits it imposes; it permits transmission of entire “non-dramatic musical and literary works” and “reasonable and limited portions” of other audio-visual works. This second provision seems to apply to films and to disallow the transmission of entire films. Some institutions would argue, I think, that an entire film is often the only “reasonable” portion to use for a particular teaching purpose, but that argument ignores the word “limited.” The point about a reasonable portion is well-taken, in my opinion, but only proves that TEACH was never an adequate solution to this problem.

Other institutions could assert fair use as the justification for streaming digital video. These schools would point out, I imagine, that courts have often held that the use of an entire work can be a fair use, based on the overall balancing of the fair use factors and the totality of circumstances. The trade group clearly disagrees, although the comments about fair use in the article are not really on target. It is correct that password-protection alone is not enough to guarantee fair use, but it does strengthen the university’s position in the complete analysis of the factors. Simply to say that a password does not make something fair use is as incomplete as asserting that an educational purpose always means a use is fair; both assertions miss the need for a complete examination and balancing of the factors.

The problem I see for a fair use justification is that courts would be likely, in my opinion, to look at the portion limits in the TEACH Act and say that that legislation was Congress’ opportunity to provide guidance on educational transmissions, and it selected a limited standard. A court that took that

approach would be unlikely to let a school “shoehorn” the entire film in under fair use, simply in order to avoid the inconvenient limits imposed by TEACH. But I have to add that there is no agreement on this point — even the intern in my office this year, who is also a lawyer, disagrees with me — and some universities clearly have decided to rely on fair use to stream entire videos.

Perhaps the most interesting argument, however, is the one that UCLA seems to be making, according to the article, based on the performance exception that proceeds TEACH in Section 110 and permits performances in face-to-face teaching situations. Section 110(1) is clearly meant to have some “give” in it, since it refers to “teaching situations” rather than classes and to “classroom[s] or similar place[s] devoted to instruction [emphasis mine].” UCLA seems to want to stretch these terms to include the course Web site as part of the face-to-face instruction. I know of other institutions, less bold than UCLA, perhaps, but still unwilling to accept unworkable limitations, that read 110(1) to permit streaming to designated sites like language labs, but not to course sites that can be accessed from anywhere. These efforts to clarify the fuzzy boundaries of 110(1) are fascinating and seem to invite a court to step in and clarify; it is just that no one wants to be the defendant in that case if they can help it. While I admit to lingering doubts, this last approach seems to me to be the most surprising, yet most promising, of the three.

There is still another obstacle, however, posed by the anti-circumvention rules added to copyright law by the Digital Millennium Copyright Act. This provision prevents the circumvention of technological protection measures even, in some cases, when the purpose of the use would be permitted. So ripping a DVD protected with CSS (Content Scramble System) may violate these rules even if it is otherwise legal. The DMCA specifically stated that these rules should not inhibit fair use, but courts have been inconsistent about that provision in circumvention cases.

Also, the Library of Congress is charged with declaring categories of exceptions to anti-circumvention in a [rulemaking process](#) every three years. New rules, which are desperately needed, were due in October 2009 but the Library punted, extending the old rules while giving itself unlimited time to try and craft new ones. The situation is getting worse on university campuses and we have to ask when the Library of Congress is going to clarify the situation.

In the end, I agree with Tracy Mitrano from Cornell, quoted in the article, that this is one more place where copyright law is not up to the technological challenges posed in higher education today. The need for revision “before [the law] does any more damage” is clear. We can only hope that the educational media industry will eventually come to understand this (they are supposed to be educational, after all) and move away from threats and towards real dialogue.

# Plus ca change, plus c'est la meme chose (GBS again)

*Tue, 17 Nov 2009 09:24:02, ksmithl2@duke.edu, [category: uncategorized]*

In the brief time since the [Amended Google Books Settlement](#) was filed with the court (on Friday the 13th) and released to the public, there has been a flurry of commentary from a variety of perspectives. Two interesting themes have emerged, however, from those on both sides of the great debate over whether the Google Books project is a good thing or a bad thing. First, both sides seem to acknowledge that the changes have not been all that substantial. Second, no one seems to think that the debate and legal maneuvering is really over.

Here is a quick look at what I perceive to be the major changes.

First, and probably most significant, the Settlement is now very clear that it applies only to books registered for copyright in the US or published in the UK, Canada or Australia. This is an obvious attempt to avoid the objections and potential legal complications of including in the new Google products books subject to different copyright regimes and different author expectations; this [comment on the Stanford Cyberlaw blog](#) calls it “a policy-oriented maneuver intended to remove political pressure coming from abroad.” It is interesting to consider what this means for the actual Google Book search results. Will we continue to see snippets only of “foreign” books scanned by Google in the free database? If so, does that indicate that Google really is continuing to assert fair use in some cases? Or will these books disappear altogether? In any case, we know that under the new terms, such works from other countries will not be part of the institutional subscription database, and that fact will substantially lower the value of the product. Many of the works that will now be excluded are the very ones that research libraries have the most difficulty obtaining via interlibrary loan, so they are ones we were most counting on finding in the Google subscription database. We must expect that the pricing of that database will be adjusted to reflect a significant decrease in value offered.

The next important thing to note about the amended settlement is what it does not do. It does not address the concerns over reader privacy that have been expressed by many groups. The Electronic Frontier Foundation expresses its disappointment about this lack of a privacy plan [here](#). In a conversation about this topic yesterday, a colleague of mine made the point that for Google to offer a privacy plan for this product would beg the question of privacy policies enterprise-wide, and that is a discussion Google, which depends on targeted advertising, does not want to have.

On the positive side, the amended settlement does clarify that rights holders can elect to allow free availability of their out-of-print but still in-copyright books, or to have them released subject to a Creative Commons license. This will be a significant benefit to academics who have retained or reclaimed copyright in their own books; unfortunately, that is a much smaller class of authors than it should be.

In many ways the heart of the settlement, its huge compulsory license to Google to commercialize orphan works and other unclaimed titles, has not changed much. There is a nice discussion of this aspect of the matter in [this New York Times article](#). The basic change being made is some restriction on how the money generated by sales of these works can be spent, and the appointment of an independent “fiduciary” to the Books Rights Registry board to protect the interests of this immense unrepresented class. The fundamental legal problem of an inappropriate use of the class action suit to

create this license does not, and probably cannot, change. Without that license, there is little if any incentive for the parties to bargain at all.

The great unknown in all of this is whether the Books Rights registry will be able to license other parties to exploit orphan works in ways similar to the opportunity the settlement creates for Google. The provisions of the first settlement that had been known as the “most favored nation” clause, which said that the BRR could not give anyone else more favorable terms than Google got, has been removed — see the changes in sections 3.8(a) and 6.2(b) in the above-linked “redline” version of the settlement. So it is now the case that if the BRR can license orphan works at all, it can give favorable terms to other parties. But that is a very big “if.” As [James Grimmelmann explains in this post](#), it is not at all clear that the BRR will have this authority until and unless Congress acts to resolve the orphan works dilemma legislatively. The NY Times article also seems to believe that this change depends on Congressional approval before the new independent fiduciary can assist with other orphan works projects. So Google likely still has its exclusive position, which could only be threatened by an unlikely combination of Congressional action and very deep pockets.

Overall, it is hard to argue with the title of this [article from Library Journal](#) which suggests that the amended settlement agreement makes only minor changes, and, as noted above, the most significant change probably decreases the overall utility of the settlement to academic libraries. The LJ article quotes a spokesman for the Open Book Alliance (which opposes the Google project) to the effect that the settlement is “sleight of hand.” Even allowing for the bias source of this quote, I think it reflects a truth, that Google and its partners (which is what they are, as opposed to opponents, at this point) wanted to change the agreement as little as was necessary to slip by the complaints raised by the Justice Department. As the NY Times article notes, that is really the only critic of the original deal that the settlement is designed to placate. Whether it has gone far enough to satisfy the DoJ is still an open question.

# What wasn't decided

Wed, 09 Dec 2009 12:19:20, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use]

Sometimes what a court does not decide can be more important than the actual ruling that the court makes. One newsworthy example of this possibility is the extraordinary step taken by the judge in the file-sharing case of Joel Tenenbaum. As this [opinion piece from Ars Technica](#) reports, Judge Nancy Gertner has finalized the decision holding Mr. Tenenbaum liable for copyright infringement, but has also detailed how she might have ruled if a limited fair use defense had been raised. To say that her 35-page memo is extraordinary is an understatement; in it she suggests that the defense team's error in raising a sweeping fair use claim rather than one narrowly tailored to specific circumstances was costly indeed.

Judge Gertner is no fan of copyright laws that hold people liable for accidental infringement, which happens fairly often with file-sharing systems (although not, apparently, in the *Tenenbaum* case) or hold teenagers liable for hundreds of thousands of dollars over a handful of songs. In her memo she invites Congress to reconsider some of the draconian provisions of our current copyright statute and also suggests that she might have found some file-sharing, in select circumstances, to be fair use. But that was not the issue put before her or decided in the case.

An even more significant decision for higher education — or really a lack of a decision — is found in a case from late October in the Southern District of New York involving online solution manuals for copyrighted textbooks. In *Pearson Education & Cengage Learning v. Nugroho* Judge Deborah Batts (who I [criticized earlier](#) in the year over her *Salinger* ruling) found copyright infringement in the defendant's online sale of solution manuals for plaintiffs' textbooks. Apparently the solution manuals were identical to ones sold by the textbook publishers themselves, although Mr. Nugroho claims he did not realize this, so the decisions seems to me to be correct for this situation. There is a nice [description of the case here](#). But, in keeping with my theme, let's look at what was not decided.

First, this ruling involved the recognition that the solution manuals were derivative works of the textbooks. This finding was necessary because the copyright in the solution manuals had never been registered, so the court was barred from considering them as independently protected works. The opinion focus on the fact that the solution manuals "have no independent viability" from the textbooks (which were registered), and are therefore considered infringing derivative works. What is not clear is where the line is after which something is no longer a derivative works, and the "independent viability" test does not seem to be a precise enough answer. If I take a single problem from a textbook and work out the solution, but do not copy any original expression, that solution may not have independent viability, but I doubt that by itself it is a derivative work. Indeed, this kind of thing happens all the time when instructors or their teaching assistants provide sample solutions through various course websites and other tools. Surely not all of these are infringing derivative works. Let me repeat that I have no quarrel with the decision as it stands, but wonder where its boundaries are, especially in regard to common educational practices.

Another issue that was not decided in this case is when the kind of derivative solutions that I have just described might be fair use. Fair use was apparently not raised, and it certainly is not considered in the ruling. Given the fact that entire solution manuals identical to those produced by the companies were being sold without authorization, I doubt a fair use defense would have been appropriate. But there are certainly situations where the creation of answer sets for problems posed in a textbook could be fair use, perhaps where a small amount of protected expression is copied or the problem represents largely

unprotected facts, and the solution sets are available without charge to a small group of students. Whether this is allowable or not is a fairly common question, especially from teaching assistants, and the important point from the *Pearson* case is to note that this issue has not been decided.

# “Renewing copyright” and a reflection on versions

Tue, 02 Feb 2010 07:27:19, ksmithl2@duke.edu, [category: authors-rights, category: copyright-in-the-classroom, category: notes, category: scholarly-publishing]

In a [post](#) about two months ago I promised that I would offer a link to the article I wrote on reforming copyright law from the perspective of academic libraries. That article was published this month in *portal: Libraries and the Academy*, and is now also available in DukeSpace, the open access repository at the Duke Libraries.

The full citation for the article is: Kevin L. Smith, “Copyright Renewal for Libraries: Seven Steps Toward a User-friendly Law,” **portal: Libraries and the Academy**, Volume 10, Number 1, January 2010, pp. 5-27.

The published version is available on Project Muse at [http://muse.jhu.edu/journals/portal\\_libraries\\_and\\_the\\_academy/summary/v010/10.1.smith.html](http://muse.jhu.edu/journals/portal_libraries_and_the_academy/summary/v010/10.1.smith.html)

If you cannot access Project Muse, this is the link to the DukeSpace version, which is my final manuscript but lacks the formatting and copy editing done by the good folks who publish *portal*:

<http://hdl.handle.net/10161/1702>

As I said in the original post linked to above, I hope my suggestions will be read in combination with those made by Professor Jessica Litman in her wonderful article on [“Real Copyright Reform.”](#)

I had intended to end this post with the information above, but a recent discovery has caused me to change that plan. Late last week I discovered that a small error, an extra clause made up of words from elsewhere in the sentence, was inserted into the HTML version of the article. It does not appear in my manuscript, nor in the PDF of the published article, only in the HTML version. I contacted the editorial folks at *portal* and expect that the error will be fixed shortly, perhaps even before I publish this post (Note on 2/2 — the error has been corrected). But it does raise some questions about some of the assertions made on behalf of traditional publication.

First, we are often told that copy editing adds value to an article and that publishers deserve compensation for adding that value whenever the public is given access to the final published version of an article. On the compensation issue I shall write more later. But here I want to note that the editorial process can insert errors as well as eliminate them. I found the editorial assistance from *portal* to be superb, but, in spite of their best efforts, the multiple stages of the publication process are not all within their control. The result was that a error that I was not responsible for, albeit a minor one, found its way into my work.

Second, this small incident raises questions about the assertion that publishers provide the scholarly community with the “version of record” that assures consistent quality. In fact, there are two different versions of my article available at this moment (on 2/1) on the Project Muse site for this journal — the HTML is different from the PDF in at least this one respect. So which is the version of record? To make that determination, I am the final arbitrator, and I hope that the error I caught in the HTML will be corrected based on my request.



This suggests that there is at least an argument that the “version of record” should be the one that is closest to the author’s hand. Who else has a greater incentive to insure accuracy, after all? A serious error may impact the publisher’s reputation to some degree, but it can be devastating to that of the author. And I would certainly hope that a significant error, such as an incorrect calculation or formula, would never be “corrected” by a copy editor without first consulting the author; it is easy to imagine cases where what looks like an error — a deviation from the expected — is in fact the heart of the argument. Thus significant corrections should always be made with input from the author, and the author would then be free to correct any versions she has made available to the public. So I would like to see discussions of “version of record” include the likelihood that the version nearest to the author may, at least sometimes, be the most accurate version available.

# LOL at the Federal Register

*Fri, 05 Feb 2010 09:13:05, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]*

It sounds very strange, but I really did find myself laughing as I read a [long notice from the Copyright Office](#) in volume 75, number 15 (Jan. 25, 2010) of the Federal Register. Admittedly, some background is necessary to acquit me of the suspicion of insanity.

The Copyright Office notice details a interim rule that makes an interesting change in Office policy. Essentially, the Office is now giving itself the right to ask for mandatory deposit of a certain class of online-only publications. Deposit is mandatory for all published works, although failure to comply with this rule does not impact the availability of copyright protection itself. But until now the Office has exempted online-only publications and, indeed, has not taken a position on whether or not such works are actually “published.” In this notice they do acknowledge, based on several court rulings, that online material is published, and they extend the mandatory deposit requirement to a circumscribed class of online-only works — essentially formal periodicals that are published online without a print equivalent. The requirement of deposit is not automatic even for these works; it will be triggered only if the Copyright Office makes a demand. And the notice is careful to exclude things like blog posts, although [this blogger wonders how successful that effort really is](#).

For me the real humor in this dry Federal Register notice concerns the issue of Digital Rights Management, or DRM — the technological protections used by many rights holders to control access to their works. Such protection measures are fiercely protected by the copyright law itself; the Digital Millennium Copyright Act added provisions that make it illegal to circumvent these electronic locks even for otherwise legal purposes. Some courts have even held, in spite of plain language in the statute, that fair use of a work can be prevented if the user would have to break through a digital lock.

So the irony that made me laugh out loud was the discovery that the Copyright Office will require that DRM be removed from the copy of an online publication that is deposited subject to this new rule. Why? Because “copies of works submitted to the Copyright Office under this interim rule must be accessible to the Office, the Library, and the Library’s users.” In order to insure this accessibility, the interim rule makes part of the definition of the “best edition” that must be deposited the criterion that “technological measures that control access to or use of the work should be removed” (see page 3867 of the Register, column 3, for these quotes).

As if to soften the blow to publishers from this rule, the Copyright Office goes on to detail the special security measures that will be taken regarding use of these deposited copies. Users will have to be in a Library of Congress facility, and only two users at a time will be given access, over a secure network. Yet the notice goes on to say that “Authorized users may print from electronic works to the extent allowed by the fair use provisions of the copyright law . . . as is the case with traditional publications.”

Here is the problem. DRM systems prevent users from exercising their rights under the Copyright law; we often cannot print from DRM-protected works even “to the extent allowed by law.” If we disable technological protections to do so, we may be subject to draconian penalties. No other library in the world has the power to exempt its users from these burdens. The Library of Congress seems to recognize the unfair restriction placed on users by DRM and is using its unique position to mitigate that problem. But what about the rest of us?

Of course, the Library of Congress does have the authority to relieve the rest of us of some of the burden created by the anti-circumvention rules. The Library is given rule-making authority by the DMCA to declare exceptions to these rules. Unfortunately, when the new exceptions were due in late 2009, the Library punted, issuing an [indefinite extension](#) of the old, inadequate exceptions and promising new rules in “no more than a few weeks.” The new exceptions have still not been announced, three months later. With the Library’s clear recognition in last week’s rule that DRM protected works are not acceptable to meet the needs of library users, we can only hope that these long-delayed exceptions, when announced, will recognize the widespread harm done by DRM and will declare broad exceptions — like the one the Library has given itself — to help the rest of us.

# OSTP comments and the issue of compensation

*Wed, 10 Feb 2010 08:51:49, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

I wanted to post this earlier, but intervening events got the better of me. As most readers will know, the White House Office of Science and Technology Policy recently collected a [wide range of very useful and specific comments in response to a request for information about public access policies](#) for federally-funded research. I wanted to point readers to two sets of comments, those that I wrote on behalf of the Duke University Office of Scholarly Communications, which are [available here](#), and the [superb comments from Harvard Provost Steven Hyman](#), which are linked from Harvard's Office of Scholarly Communications blog, the Occasional Pamphlet.

One issue that arises in some of the OSTP comments is "compensation" for publishers when the final published version of articles based on federally-funded research is made publicly accessible. I was recently part of a conversation on public access in which several academic publishers from scholarly societies raised this term. I bit my tongue at the time to keep from yelling because I thought it was an idiosyncratic notion with no legs. But when I looked at the full set of OSTP comments, I notice that compensation is brought up by numerous publishers. See, for example, the comments from the Association of American Publishers, from Elsevier, and from STM: the Association of Scientific, Technical and Medical Publishers. This [last set of comments](#) is very explicit in suggesting that publishers deserve financial compensation (not just "compensation" in the form of embargos) for the value they add to scholarly articles through managing peer-review and copy editing (see page 10).

I continue to be amazed that scholarly publishers are willing to make this demand in this language, but all I can say is that it is a conversation I am anxious to have. I hope we can discuss the failures of compensation that occur throughout the scholarly publication system. Publishers, of course, are usually the only ones who actually profit financially from scholarly journal articles. Taxpayers often underwrite the work upon which those articles are based, and universities also supply resources and salaries to the authors. Where is compensation for those entities, which rightfully should be paid out of subscription income? Instead, of course, it is the universities that pay to get back the products of their own research, through their library budgets. Peer-review is, of course, managed by publishers, but the actual intellectual work is again done by university faculty members, who donate their time and labor to improve scholarship. If we are going to talk about compensation, let's discuss how they should be compensated from the profits publishers make from their work. And finally, how should scholars be compensated for transferring their copyrights to publishers? There are, after all, substantial lost opportunity costs whenever an author surrenders control over their work. These transfers have almost always been gratuitous in the past, but if we are going to talk about compensation, perhaps that can change.

In short, I hope we can have a conversation about compensation, because such a conversation can only reveal how exploitative and unsustainable the current model is. If we discuss the full range of compensation issues, and not only narrow questions about copy editing, perhaps we can make progress towards a fair system of scholarly communications.

# Should the court consider the new Google patent?

*Wed, 17 Feb 2010 13:50:56, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: technologies]*

On Tuesday Google was formally granted a patent on software to selectively control access to content, based on access rules and geographical locations. There is a story on Ars Technica [here](#) that explains the patent and its potential application very nicely. Basically, this is a technique for filtering what users can see based on where they are in the world. Such filtering is not new; Yahoo! famously lost a court case in France and had to begin controlling access to its auction sites to prevent Nazi memorabilia from being sold in that country. Different international laws about all kinds of topics can force Internet services to distinguish what can and cannot be seen in different parts of the world.

This story is interesting, however, for at least three reasons, the last one very relevant to the fairness hearing being held tomorrow in regard to the proposed settlement of the copyright lawsuit over the Google Books project.

The first thing that is interesting in this story is the fact that the patent application for this software was filed in September of 2004. The five and a half year gap between initial filing and final approval is not necessarily unusual, but it gives me a chance to remind readers how long and costly the patent process is. This is a huge difference between copyright and patents, and indicates why copyright is usually so much more important to higher education. Every scholar, administrator, librarian and student owns copyrights, but relatively few can afford the time and money to obtain a patent, even if they have an invention that meets the much higher standards for patentability.

Which brings me to the second point: should software of this type even be eligible for patent protection? Software patents were controversial for a long time because they were alleged to represent “only” abstract ideas — algorithms based on zeros and ones. And until at least the mid-1990s, the Patent Office and the courts would not recognize patents for business methods. All of that seemed to be resolved in favor of patenting business method software, but a case currently before the Supreme Court, called [Bilski v. Kappos](#), has the potential to alter the rules on this issue.

But it is the impact of this patent on the Google Books settlement that really interests me. Should the court considering the settlement tomorrow take notice of this patent? If it did, what impact would it have? Given the objections to the settlement from international copyright holders and the promises Google has made to exclude works from outside the US, UK and Canada, the need for some filtering system seems obvious. So from one point of view, this patent is indicative of Google’s good faith efforts to do what it has promised to do. Nevertheless, there are some less charitable interpretations that could be applied.

For one thing, this software could enable censorship of the type Google first practiced, then rejected, in China. We should never forget that the origin of copyright was as a tool for censorship; anything that automates copyright enforcement runs the risk of facilitating repression.

Of most interest to the GB settlement, however, is the question of whether this patent ratchets up the worry about a Google monopoly over digital books. Lots of comment has been made about the possibility that Google will have a monopoly over digital access to orphan works. It is unlikely that any

other party will be able to get the same kind of compulsory license for all orphan works that Google stands to gain in this class action settlement. Now we must face the possibility that, even if a competitor could get such a license, in order to effectuate the necessary access restrictions they would have to seek a license from Google for these patented process.

The Ars Technica article points out that Google has promised not to use its patent portfolio for offensive purposes, that is, to limit competition, and that its record so far suggests that it is serious about that promise. Nevertheless, courts need to look beyond promises to “do no evil” and think about long-term consequences. As it considers whether the proposed settlement will give Google too much market power, it might be well to consider this patent on geographical filtering software as one more reason to keep a sharp eye on the project as it proceeds.

# How efficient is our licensing system?

*Wed, 24 Feb 2010 10:42:00, ksmithl2@duke.edu, [category: uncategorized]*

Two letters landed on my desk a few weeks ago, both from the [Copyright Clearance Center](#). I have [written before about concerns over what we are actually paying for](#) when we pay permission fees to CCC, and my experience with these two letters deepened that concern.

The first letter asked us to give permission for another university to use in class a newsletter from the 1970s that is on our digital collections web site as part of the holdings of the Sallie Bingham Center for Women's History. We had to deny the request because we do not hold the rights in this particular newsletter; we have digitized and displayed it based on a belief that doing so is fair use. In any case, the original author cannot be located since [the work was pseudonymous](#). The result is that CCC, having actually failed to contact the rights holder, will now send the other university a denial of permission message. This disturbed me, and I decided to get in touch with the professor directly, suggesting that she link to our digital collection so her students would still be able to read the work. Unfortunately, the permission mechanism at CCC is an either / or switch, which cannot accommodate all of the nuances of copyright in higher education.

The second letter started a much more complicate chase. It informed us that someone at Duke was entitled to a royalty check, but that the original check had gone uncashed for 6 months. The letter offered to reissue a check (for a \$25 fee that was nearly half the total amount) or gave us the option to refuse the payment altogether. Since the letter was sent to an impossible address — the name of one University entity but the box number for a different one — it was no surprise that the first check had been lost. When this second notice found its way to my desk, I decided to investigate.

What I found was very troubling. The folks at the CCC told me that the royalties had been collected from a South African university and they cited two titles. Unfortunately, neither title seems to be something for which anyone at Duke has the rights in the first place. One appeared to be a Harvard Business case study; the other was an article from a journal for which I was given an ISSN that is non-existent. None of the authors named by CCC appear to have any connection to Duke, and I cannot locate the specific article at all. When I asked for more details, two different representatives at CCC promised to call me back. That was three weeks ago, and I have heard nothing further.

My concern here is not to collect the \$56 dollars being offered to us. Instead, I am wondering just what that South African university actually paid for. Obviously a substantial fee was collected and permission granted. Yet the CCC seems to have based that fee on a mistaken perception of who the rights holder is and that they were authorized by that rights holder to sell the permission.

We are often told that the application of fair use on campus can be quite narrow because there is an efficient mechanism for licensing reuse and rewarding authors. This experience reinforces my perception that that mechanism is not as efficient as is often claimed, and that a great deal of the money we spend on permissions never does get to the authors who are supposed to be rewarded. The fact is that locating rights holders is very difficult, and the Copyright Clearance Center is as much at the mercy of those difficulties as are the rest of us. One of the reasons for reinstating a renewal provision for US authors into our copyright law would be to make locating the real holder of specific rights much easier. Until we have such a system in place, we must be wary of relying too heavily on any licensing organization to actually know who each rights holder is and how to get them the fees that are supposed to motivate them.

# A pyrrhic victory

*Wed, 03 Mar 2010 11:14:23, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain]*

There was a disturbing decision in a copyright case from the US Court of Appeals for the Federal Circuit last week. The Court of Appeals held that a U.S. postage stamp issued to commemorate the 50<sup>th</sup> anniversary of the armistice that ended the Korean War infringed a copyright held by the sculptor who created the famous statues of soldiers matching in a column that is part of the Korean War Veterans Memorial in Washington D.C. The stamp is based on a photograph taken by a photographer who originally intended it as a gift for his Korean War veteran father, but later sold copies to, among others, the U.S. Postal Service.

Commentators on the decision have focus on the Circuit Court's rejection of the lower court's ruling that the stamp makes fair use of the statues; see comments [here](#) and [here \(with a link to the full decision\)](#). These commentators are rightly troubled by the finding on appeal that the stamp is not a transformative use of the statues. But I want to consider a couple of slightly different issues.

First, the right of Frank Gaylord, the sculptor, to assert a copyright claim against the United States is not entirely clear. One judge on the three judge panel dissented strongly from the majority conclusion largely on the basis that the United States, which commissioned the work, held rights in it by both statute and contract.

The majority holds, in its fair use analysis, that the use of the photo on a postage stamp was a commercial use, even though the "commercial" entity involved is a self-supporting agency of the US government. The decision that the sculptor is entitled to damages from the US Postal Service, in addition to the \$775,000 he was paid for the original work, has direct implications for all of us as taxpayers. The reason for statutory and contractual claims by the government to rights in works it commissions is precisely to protect taxpayers from these kinds of claims. To call this stamp a commercial use ignores the relationship between "we the people" and the postal service, and it dishonors the real intent of the stamp to further honor Korean War veterans.

The second issue I want to raise is the impact of this decision on amateur photography and on public art. It is interesting that the court does not hold that the postage stamp has damaged the market for the original; they even note that the sculptor admits that the stamp has *enhanced* the value of the original work. Yet without evidence of market harm, they reject fair use based on the other three factors. By shaping the decision this way, the court seems to suggest that amateur photography of publicly visible works of art could be infringing. The original purpose of the photograph, after all, was purely personal. And, of course, personal uses do not get a mention in the fair use provision as one of those uses that are presumptively fair.

So is it possible that an artist whose work is displayed in public could have an infringement claim against a tourist who takes a picture? It seems unlikely, but this decision strengthens the possibility. The court explicitly considers the exception added to copyright law for photographs taken of architectural works and finds that sculpture does not fall within its ambit. If such an exception is needed for photographs of buildings and does not apply to sculpture or other art works, the status of photographs of the latter is clearly in doubt.



Apparently what we need is Congressional action to tell the Federal Circuit that this decision was wrong by enacting a separate exception for photographs of public art.

And then, finally, there is the chilling effect that this decision must have on commissions for public art. A single artist has here won a windfall against the government, but it is surely a Pyrrhic victory as regards artists in general. If works of public art cannot be photographed and displayed in order to encourage people to visit, admire and reflect, the reason for commissioning such works in the first place is diminished. The majority writes in its decision that allowing the government to “exploit” the statues “will not advance the purpose of copyright in this case,” but they do not explain why that is so. Indeed, if the purpose of copyright is to create incentives for artists to create, the opposite is true. Mr. Gaylord was well paid for his work and there is no evidence that licensing for a postage stamp was ever imagined as part of his incentive (although coffee mugs and commemorative plates apparently were). But the potential effect of the ruling on future commissions could depress the incentive for creation, a result entirely contrary to the point of copyright law.

By the way, there is [another story of a lawsuit](#) over photographs of a public art work here, describing a suit over the famous statue of Jesus that stands over Rio and was “destroyed” by filmmakers from Columbia Pictures in the movie *2012*. More reason for a statutory (pardon the pun) exception to the copyright in public art.

# Smoke got in my eyes

*Fri, 05 Mar 2010 10:10:03, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use, category: technologies]*

It has been widely reported that UCLA has decided to re-start its program of streaming digitized videos for course-related viewing. They do so based on a set of principles adopted by the faculty, which can be [read here](#).

Readers of this blog will recall that I have [previously expressed ambivalence](#) about whether and how this practice can be justified under our current copyright law. I expressed that ambivalence in this posting, and many comments flowed in, most from experts for whose opinions I have great respect. Several were more sanguine than I about the legality of streamed digital video, while some were certain that no justification could be found.

I still had not made up my mind when I read about UCLA's decision to resume their activities. But [yesterday's article in Inside Higher Ed.](#), which includes statements from the lawyer for the trade group that originally threatened UCLA, has really helped me clarify the issues. It seems to me that there are two glaring and obvious misstatements in AIME's denunciations of UCLA, and that these misstatements actually point out why the practice is justifiable.

First, AIME's lawyer insists that UCLA will stream videos to "an unlimited number of students." But a cursory reading of the principles adopted at UCLA shows that the program will limit access to each video only to students enrolled in a class for which that film is required content. Surely that is a limit on the number of students who will see the film using UCLA's streamed service; only those students who can authenticate into the course management site for the particular course will be able to view each film. In other words, the audience is limited in exactly the same way that it would be if the film were shown in a classroom to the assembled students.

Second, the remarks from AIME stress the fact that UCLA will buy only a single copy of each film, as if that is different from prior practice. But of course, most universities buy only one copy of most DVDs, which are then shown in class to a group of students or put on reserve so that students can come in and watch the film in a library or media lab one at a time. During the time UCLA had suspended its program, this was the practice it followed. What it did not do was buy large numbers of each film and hand them out to individual students, which the AIME statement seems to suggest is the only alternative.

This, of course, is absurd, and it is disingenuous. In its negotiations with UCLA, I am very sure that AIME did not propose that there was some number of multiple DVDs which, if purchased, would render the practice of streaming that film for student viewing fair. If there is such a number, I suggest that AIME should tell us what it is; I am sure many schools would prefer to buy that number of copies in order to provide the streaming services our faculty and students want while still not exposing themselves to liability. But multiple sales are not the issue here.

What AIME is seeking, naturally, is repeated licensing fees. They are happy to have schools buy only one copy and stream it if, for each film, a license fee greatly in excess of the cost of the DVD itself is paid, and paid each semester. The film companies do not want to settle for slightly increased sales of DVDs in this matter, they want to turn our campus intranets into pay-per-use jukeboxes that will provide a new and virtually unlimited income stream.

In the past, universities bought single copies of films and showed them to groups gathered together in a classroom or to students on a one-to-one basis. The film companies may have grumbled about the doctrine of first sale and the face-to-face teaching exception that permitted this, but there was little they could do. Now those film companies hope to create new revenue by forcing us to pay to show the same single copy to the same students over a closed network. In short, they want large fees for space-shifting.

The fact that AIME's attorney uses this phrasing, with its two statements that misdirect the reader from the real issue, suggests that he realizes how strong the fair use argument, based on space and time shifting to accomplish a purpose that is specifically authorized by the copyright act, really is. Rhetoric about single copies and unlimited students is a smokescreen, and when the smoke is cleared away it is easier than it has ever been for me to see the powerful fair use argument in clear focus.

# Summary judgment in the GSU case?

*Tue, 09 Mar 2010 09:15:28, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use]*

Both sides in the Georgia State copyright infringement case — which challenges as infringement the use of excerpts from copyrighted content in the University’s electronic reserves and course management systems — have now filed motions for summary judgment, with supporting briefs and affidavits. The actual motions and arguments in support can be found [here](#), at filings 142 (plaintiffs) and 160 (defendants).

These filings, where each side asks the judge to decide the matter without trial on the basis of the documents filed with the court, are not unusual in copyright cases. An increasing number of civil cases of all kinds are decided on summary judgment, so this is “worth a shot” for both sides. And, of course, each side believes it has an argument that wins hands down.

The plaintiffs in the case — Cambridge University Press, Oxford University Press and Sage Publications — argue that supplying readings to students without paying permission fees each semester for pretty much everything is obvious copyright infringement. They specifically attempt to refute the claim that such copying is fair use. Several aspects of that argument should cause great concern in higher education.

First, the plaintiffs argue that a fair use “checklist” is the wrong tool for helping faculty members make fair use decisions. The checklist adopted as part of GSU’s new copyright policy is, they assert, “skewed in favor of a “fair use” outcome.” This is worrying because so many institutions have adopted a form of the checklist, believing it to be appropriate in part because the Association of American Publishers seemed to endorse it when they approved revised copyright policies that include the checklist in their negotiations with Cornell and several other institutions. In fact, the Copyright Clearance Center, which is the permissions collection agency for all three plaintiff publishers, itself suggests a version of the checklist that can be found [here](#). If there is a distinction between these checklists and that used by Georgia State, we need to know what it is, but as far as I can tell, the CCC checklist works in exactly the same way that the plaintiffs object to regarding the GSU version.

If the checklist is not a good guide for fair use, in the publishers’ opinion, what should we look to? The plaintiffs suggest two major guideposts for fair use — the notion of transformation and the Classroom Copying guidelines from 1976. Transformativeness, of course, never appears to apply to copying of small excerpts for distribution to students, unless it is given a very broad definition which the plaintiffs deny here. And the guidelines for classroom copying, which were adopted in spite of objections from higher education and are intended to apply to a different situation, cap the length of an fair use excerpt at 1,000 words. Such a limit would rule out about 99% of all readings offered to students under fair use. So we are left to ask what would be fair use in an e-reserve situation; the plaintiffs’ brief suggests that almost nothing would be permitted without paying for permission each semester.

Interestingly, the defendants’ brief does not make an argument about fair use at all, although it is implicit in their reliance on their new policy. Instead they argue two fundamental points. First, they claim that the suit is misdirected under the narrow exception to sovereign immunity that the plaintiffs are trying to exploit. This is the force of the argument that none of the named defendants have a direct or indirect role in any copyright infringement, so an injunction against them would be ineffective and the suit, therefore, should be dismissed. Their second point is that the requested injunction, because it

does not permit any room at all for the exercise of fair use as defined by the GSU policy, is too broad and vague to meet the basic requirements for such orders.

I have to note in regard to these cross motions that I am not particularly a fan of deciding fair use arguments on the basis of summary judgment. Fair use is intended to force courts to make a detailed examination of the circumstances of the use in each case. All too often it has become as mechanical in court as the plaintiffs complain that the fair use checklist is. Courts ask routine and traditional questions regarding each factor and then add up the results; they do not, usually, probe as they should into specific circumstances, for which the usual questions are often a very poor substitute. This unfortunate tendency is made much worse when fair use cases are decided on summary judgment, where all the judge has is the documents filed and is unable to ask questions and seek more specific information.

So I guess I am left hoping, in this case, for one of two results. Either the defendants' motion should be granted, in which case the case goes away on essentially procedural grounds and we are all left where we have been for years, or both motions should be denied and the case taken to trial. In the latter case, the fair use dispute could be fully aired and a useful record developed. Only in that situation would other universities be able to glean really helpful guidance from a decision.

# It probably needs to be said

Wed, 17 Mar 2010 13:15:50, ksmithl2@duke.edu, [category: uncategorized]

Copyright junkies will remember the superb blog maintained for several years by copyright scholar, author and practitioner William Patry. Many will also recall that Patry shuttered his blog in 2008, in part because of his growing perception that readers were not able to separate his personal opinions expressed therein from official policies or opinions of his employer.

I can not claim even a fraction of Patry's erudition or experience around copyright matters, but I am afraid I can claim a little bit of his problem. Several recent communications about this blog have pushed me to want to be very clear about the relationship between what is written here and the policies of Duke University.

To begin with, I have to acknowledge that the problem of separating my opinions from Duke policy is a little more difficult on this site because it is part of the Duke Libraries website and is maintained, as is the whole Libraries' web presence, by Library IT staff. Nevertheless, much of what has been and, I hope, will continue to be written here is my opinion, and solely my opinion.

To begin with, I need to distinguish the blog from other parts of the web site. Many of the "static" pages are intended to provide guidance for Duke faculty, staff and students, as well as others who stumble across them. These pages contain, to the best of our ability, objective analysis and application of copyright law. Likewise, one category of blog posts, that labeled "Copyright Information Notes," is used for explanations of copyright law principles, provisions and applications. All of this material, while not University policy *per se*, is somewhat more objective than mere opinion and is intended to be useful in guiding practice.

All of the rest of the blog posts, however, reflect my own opinion and not in any way the policies of Duke University. Indeed, I often express opinions about what legislation *ought* to be adopted or how a court in a particular case *ought* to rule that are at odds with my advice to individuals engaged in actual creation or use of copyrighted materials at Duke. This is because the way the law actually is can often be very different from how I think it ought to be.

To be very specific about this point, let me refer to two recent posts on this site. In one, I expressed agreement, after long uncertainty, with the general shape of a fair use argument for streaming digitized video for teaching purposes. My agreement with this argument, however, does not mean that Duke will suddenly embrace the practice, nor that I will encourage the University to do so. The reason is that, first, even well constructed fair use arguments do not always win in court and, second, that defending a fair use case is very expensive even when the defendant is successful. So my advice on this matter will always be tempered with a risk analysis for the University and a discussion of how the benefits of a new practice weight against the potential costs involved. This is a discussion that is unique to each institution and must remain distinct from the more theoretical opinions expressed in blog posts.

As another example, let me say very clearly that my comments about the flaws and/or causes for concern that I see in the plaintiff's motion for summary judgment in the Georgia State copyright infringement lawsuit cannot be used to speculate about Duke's policies about the practices in question. Indeed, Duke's policies are clearly formulated and usually can be found on its website. Those interested can look for official documents and neither need to nor should assume that the opinions I express about how other conflicts ought to be resolved reflect University policy or practice.

Finally, I want to express my gratitude to Duke for allowing me the leeway to express my opinions in this manner. No one at Duke has ever challenged my right to say what I please in this space and this current message is not instigated by any internal concerns at Duke. Instead, I have become aware that some of my readers from elsewhere have tried to draw erroneous conclusions about Duke from what I have written. I hope that readers in the future will be more careful to recognize the nature of what they read here and that I will, on the basis of that care, be able to continue to trespass on Duke's generosity by expressing my own opinions on this site.

# Open Access at Duke

*Fri, 19 Mar 2010 08:03:04, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Yesterday the Academic Council at Duke University unanimously adopted an Open Access policy for scholarly articles written by the Duke faculty. The policy was brought forward by a Provost-appointed committee of faculty and librarians that was chaired by Professor Cathy Davidson (whose [earlier post on the subject is here](#)) and Paolo Mangiafico, Duke's Director of Digital Information Strategy. I also serve on the Task Force and participated with Cathy, Paolo and others in many discussion sessions where questions were raised and adjustments made to the final documents.

For those who would like to see the policy as adopted, which consists of a preamble, the policy itself, which is a single page, and a nine page FAQ, [here is a link](#). There was also a [news story](#) that describes the policy quite well published by Duke News and Communications two weeks ago.

Several observations about the process of getting this policy adopted occur to me. First, I think we were all surprised to find that the idea of open access itself was fairly uncontroversial. Most of the difficult challenges we faced had to do with the process that will be implemented for faculty to make their works available in a repository, not the concept of openness. Now we are faced with developing procedures and systems that will be easy and intuitive for faculty, which may be the greatest challenge yet. Our faculty have told us, in essence, that if we build it they will come, as long as we build it well.

In that vein, I was interested by this blog post called "[Let's Make Open Access Work](#)." I don't agree with all of it (as the author himself predicts), but it is an interesting set of challenges to reflect upon as we design OA systems.

There were, of course, questions about the impact of OA on journals, and the presence on the task force of a representative of the Duke University Press and others with ties to traditional publishing was a great help. But it is also true that we heard a lot of complaints directed against the traditional models of scholarly communication from the faculty.

One thing that librarians often believe is that faculty will only be motivated for open access by their own self-interest — impact, citation and the like. But yesterday Cathy Davidson made an eloquent plea for greater access for people around the world who are blocked by high subscriptions costs and other "toll-access" policies. All round the room, heads were nodding as she spoke. I was reminded that most faculty members genuinely do care about the overall welfare of scholarship and learning.

Finally, I was very impressed by the collegial and respectful system of faculty governance that I got to observe yesterday. The challenges raised throughout this process about open access were very real, and the work of getting to a unanimous vote was considerable. But all the way along, and especially in yesterday's Academic Council meeting, I had the strong sense that people were listening to each other and learning as they conversed, which is, I believe, shared decision-making at its best. Of course, it helps that they ultimately made the decision that I favored; this is the real world, after all!



# Getting hit with a BRIC

Wed, 24 Mar 2010 10:55:15, ksmithl2@duke.edu, [category: international-ip]

The arena of international intellectual property and the WIPO Development Agenda is one I enter with considerable trepidation, because it is complex and shrouded in a language all its own. Fortunately, one of Duke's own law professor's, Jerome Reichman, is an always reliable guide, and I read with careful attention his article "Intellectual Property in the Twenty-First Century: Will Developing Countries Lead or Follow?" The article is itself technical and complex, but it is rewarding for its message to the developing world that they have a choice as they create or refine IP laws for their own best interests. Reichman argues persuasively that simply replicating the high-protectionist regimes in place in the U.S. and the European Union is not the only, or the best, option for countries trying to develop their own economies.

Reichman's article is available [here, on the web site for the Houston Law Review](#) (in vol. 46, number 4).

The danger, of course, is that when levels of IP protection are set too high they can inhibit innovation and growth. Established technologies and industries can be protected to the point of becoming lazy, while new innovation and creative development can be stifled. Reichman cites several examples of this trend, in a general way, when he describes patent "thickets," "blocking" strategies that prevent improvements and how overlapping IP claims can inhibit broad use of "platform technologies" for innovation. Anyone interested in a specific example of how patent protection can inhibit needed scientific development should read this [blog post about hoarding of biological samples](#) because of fears that patented drugs will be developed from them and increase the cost of health care for the developing countries that hold the samples.

Reichman proposes some specific strategies that developing countries, particularly that group of developing nations with very fast-growing economies that are known as BRIC (Brazil, Russia, India & China) countries, could follow to prevent these problems and to foster innovation and growth. In the patent arena he suggests several places where compulsory licenses would be productive — for secondary research, especially when it can offer an improvement on the original technology, and for third party suppliers whose involvement is necessary to supply a particular market in the public interest. He also advocates some doctrines that can be incorporated into IP law that would encourage growth. Here, for example, he suggests an "essential facilities" doctrine in patent law that would make it possible to "pool" overlapping patents when access to a vital technological platform for research is at stake. In copyright, he suggests that the idea/expression distinction be codified in national laws and that a broad, clear research exception be included, as well as a more flexible exception like the U.S. fair use provision.

In general, Reichman's suggestions about how a combination of compulsory licenses and "[liability rules](#)" could be used to give IP law the flexibility to really encourage research and development point in a positive direction for the developing world. He also acknowledges that these countries will have to stand up against the pressure brought on them by the U.S. and the E.U. to adopt imitative regimes of high-protectionist rules that, he argues, would ultimately be counter-productive.

As I read this article, I kept thinking about the concern expressed by politicians and the media about the high level of U.S. debt held by China and the general sense that these "BRIC" countries are mounting a serious challenge to the dominant place the U.S. has held in the world economy. If some of these fast-growing economies were to adopt Reichman's recommendations, that competition could increase dramatically. Indeed, U.S. dominance might find itself "hit with a BRIC." Perhaps the best way for the

U.S. to stay competitive with the world is not to try to foist our regime, which seems to be counter-productive in the most literal sense, on others, but to move ourselves toward a more growth-oriented system of IP protections, limitations and exceptions.

# More big words in international copyright

*Fri, 02 Apr 2010 10:05:08, ksmithl2@duke.edu, [category: international-ip]*

Following up on an [earlier post](#) about the potential for fast-growing developing countries to adopt less restrictive, more growth-oriented IP regulations, I want to look at two concepts that are important for understanding international IP debates.

The first is “counter-harmonization,” which is used several times in the article I referred to about the BRIC countries by Jerome Reichman. The movement to harmonize international copyright laws resulted in the Berne Convention, which the US finally joined in 1988, and the TRIPs agreement (for “Trade Related Aspects of Intellectual Property”) adopted by the World Trade Organization in 1994. Those treaties have a lot to say about harmonizing levels of protection for copyrighted materials, but very little in regard to limitations and exceptions. In other words, parties to the agreements are obligated to provide protection without formalities and to extend protection for at least the life of an author plus 50 years. No similar obligation exists to provide any particular exceptions to copyright protection, such as educational viewings of films, free library lending, or reproduction of small excerpts for the purpose of research and scholarship.

In fact, the international treaties have generally seemed rather hostile to limitations and exceptions, even though they are as much at the core of the reason for copyright as is protection itself, at least insofar as copyright is intended to encourage creativity and innovation. Creativity depends on some rights of reuse as much as it does on the assurance of a market for new works. But in Berne and TRIPs, all exceptions in the national laws of the signers are made subject to a three-step test that has been interpreted, wrongly in my opinion, to be so narrow that many existing exceptions in national laws would violate its terms.

The call for counter-harmonization comes out of the WIPO development agenda, which has recognized that harmonizing only high levels of protection without also building in safeguards for reuse and innovation is contrary to the best interests of developing countries. Those countries are being encouraged, by Prof. Reichman and others, to exploit the flexibility still available under Berne and TRIPs to adopt limitations and exceptions that best suit the needs of their own growing economies.

The other major concept that is currently getting some attention is “cross-retaliation.” The TRIPs agreement, for the first time in international law, gives countries the right to retaliate against another signer, if and when their IP rights are not protected, by imposing tariffs and other restrictions on other types of goods and trade. So if country A gets a ruling that its IP rights are not being adequately protected in country B, A can impose tariffs on manufactured goods or crops imported from B. This was new in the TRIPs agreement and has created some interesting problems. Pedro Paranagua, who is a law professor from Brazil and a doctoral candidate at Duke University’s Law School, [explains in this blog post](#) how retaliation can be used both to enforce IP protections and to penalize an IP producer who competes unfairly in other markets.

As Paranagua explains, the US and other developed countries want retaliation under TRIPs to be a one-way affair — available only to a country whose IP rights were infringed so that they could penalize the infringer in other markets. The WTO, however, ultimately allowed cross-retaliation to be two-way, so that a country whose markets in other goods are unfairly impeded — cotton is the market at issue in Paranagua’s post — could retaliate against IP from the offending country.

Cross-retaliation is another example of unintended consequences for the United States, and another indication that developing countries, particular those whose economies are growing rapidly, can use the international IP treaties to their own advantage. As the global economy becomes more and more competitive, it behooves each nation, including ours, to re-examine its stance on IP regulation with an eye to fostering its overall best interests, rather than the needs of only one segment of the world-wide market.

# A lens on the digital challenge

*Mon, 29 Mar 2010 11:24:11, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies, category: user-generated-content]*

On March 19th a fascinating [symposium](#) was held in Chapel Hill, NC in honor of Laura (Lolly) Gasaway. Lolly, for many years Professor & Law Librarian at UNC Chapel Hill and now Associate Dean for Academic Affairs, is a prolific scholar and has had a tremendous impact on how libraries understand and work with copyright law. She is also a gracious and generous friend; meeting her has been one of the best parts of coming to work in the Research Triangle, even if we are on opposite sides of the great basketball divide. The symposium in her honor was a gallery of prominent and interesting speakers who witnessed to the full range of Lolly's intellectual and practical influence.

I was particular interested in the remarks made by Professor Llewellyn Gibbons of the University of Toledo College of Law, who talked about the [Visual Artist's Rights Act](#) (VARA) and its application in the digital environment.

VARA was adopted in 1990 and adds a section to the Copyright Act (section 106A) that carves out a special right for visual artists. An artist who creates a covered work under VARA gets a truncated version of the "moral rights" that are recognized in most other countries — a right of attribution and a right to ensure the integrity of the art work. VARA applies only to a narrow category of works — paintings, drawings, prints, sculptures, or still photographic images produced for exhibition only, and existing in single copies or in limited editions of 200 or fewer copies, signed by the artist. It is interesting to note that this is the only recognition of these moral rights in U.S. law, in spite of our commitment when we joined the Berne Convention to protect such rights for all rights holders.

Professor Gibbons raised the issue of how well or poorly VARA might apply to an artist who works in digital media. The real problem, he pointed out, is the limitation to works that exist in 200 or fewer copies. How do we talk about a limited number of copies in an environment that promiscuously makes copies every time material is displayed, download or transmitted? This question is remarkably similar to one that the [Section 108 Study Group](#), co-chaired by Lolly, grappled with regarding the application in the digital realm of the limit on the number of preservation and interlibrary loan copies that a library can make.

Suppose an artist creates a digital work and displays it on her website. That, we could argue, is a single copy. But people will download that work and, without some control, soon there will be more than 200 copies. And even that way of stating the problem assumes that the ephemeral copies created in a computer's memory whenever a site is visited do not count (they are not copyright infringements because of section 117 of the Copyright Act, but that does not determine whether they would count toward the restriction in VARA). Professor Gibbons discussed the possibility that a "download and delete" scheme, presumably based on coding that would prevent the 201st download and would prevent a downloaded copy from proliferating (similar to the DRM used by iTunes?), might preserve VARA rights for such an artist.

I am less than optimistic that the scheme Gibbons suggests could really work, but I look forward to reading his paper when the proceedings of the symposium are published in the [Journal of Law & Technology](#). In the meantime, it seems very obvious to me that the idea of digital art is completely outside of what Congress was imagining when it drafted VARA 20 years ago. And that, perhaps, is the most important point. This attempt to imagine how VARA could apply to digital art clearly demonstrates

the inability of copyright law, even with relatively recent revisions, to keep up with changing technology. It highlights the near impossibility of creating a law flexible enough to respond to new technologies. The real digital challenge is to create a copyright law that is permeable enough to provide “escape hatches” through which new technological possibilities can slide so that creativity is not inhibited for the long periods of time it takes for law to catch up with human ingenuity.

# Is it cool to be a pirate?

*Wed, 07 Apr 2010 12:18:11, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

The content industries have been using the terms ‘piracy’ and ‘pirate’ for many years to describe people the law itself would call infringers. In his book [“Moral Panics and the Copyright Wars,”](#) William Patry makes it very clear that he considers this term an excessive and exaggerated use of language intended to create a moral panic. That opinion seems to be reinforced when we read about defense lawyers who attempt to exclude the use of the term in a criminal trial, as reported in this blog post on [“Can the Government Use the Term ‘Music Piracy’ in a Criminal Copyright Trial?”](#)

Recently, however, another trend is developing, and it challenges the notion that this is an absolute term of opprobrium. I say developing, but I recently ran across this sentence from R.R. Bowker’s 1912 volume on “Copyright: Its History and Law”:

The word “piracy,” since that gentle craft has disappeared from the high seas, has come commonly into use to mean free-booting with reference to literary property.

It is highly unlikely that the content industries would agree that piracy is or ever was a “gentle craft,” but there are indications that those groups are now regretting the prevalence of the term because it sounds romantic and exciting. Several recent blog posts ([here](#) and [here](#)) have reported on concerns in the entertainment industry that “piracy” sounds “too sexy” and tends to remind people of Johnny Depp. This worry is well-taken; I was recently talking to a lawyer who is 20 years younger than I and he opined that the use of the pirate metaphor was a poor strategy because to folks of his generation, and in general to anti-authoritarian teenagers, the idea of being a pirate was “cool”.

This discussion is interesting to me as I read through Adrian Johns’ new book on [“Piracy: The Intellectual Property Wars from Gutenberg to Gates.”](#) Johns makes two important points, I think. First, that the use of pirate and piracy as a way to refer to some types of IP infringement is a very old phenomenon. Like Bowker, Johns locates such usage well back into the 18th century. Second, Johns argues that piracy has often been the driving force behind both technological innovation and the reform of intellectual property laws. So it seems that maybe we should accept the term, at least in a certain context, rather than seeing it as a prelude to moral panic, and also recognize that, if not gentle or sexy, piracy, at any rate, sometimes pushed law in the right direction. It is always useful to remember, for instance, that the video cassette recorder was considered a pirate device by the movie industry for quite some time before they realized — only after they were forced by the Supreme Court to deal with the technology — that it could be the source of considerable revenue.

I suggest that piracy should be reserved for instances of wholesale commercial exploitation of copyrighted material without authorization. Such usage, applied to bootlegged DVD or CD distribution, for example, makes some sense and is congruent with historical precedents. For less systematic acts of unauthorized reproduction and distribution, such as individuals who share files over P2P networks, the word pirate both seems like rhetorical overkill and might well backfire, as the content industries are apparently beginning to recognize.

# Fair use and the law of trespass

Tue, 13 Apr 2010 12:14:19, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

A convoluted copyright infringement case that was decided earlier this month — *Latimer v. Roaring Toyz, Inc.* — once again raises the question of what is fair use. There is a nice [summary of the case here](#), and the [decision is here](#).

The facts are quite complicated, involving custom painted motorcycles and the issue of whether a photograph of the motorcycle is a derivative work that implicates the designer's copyright. But the point that caught my attention was that the district court, in granting summary judgment, raised on its own initiative (the legal term is *sua sponte*) a fair use argument on the defendants' behalf. The 11<sup>th</sup> Circuit Court of Appeals subsequently held that this was a legal error; that fair use is an "affirmative defense" that must be raised by the defendant and cannot be invoked by the court if it is not.

First, I want to note with approval the statement by the 11<sup>th</sup> Circuit that "Courts have historically viewed summary judgment as inappropriate in the copyright infringement context because of the inherently subjective nature of the inquiry." I made [this argument](#) several weeks ago in suggesting that summary judgment on the fair use issue was inappropriate in the copyright infringement case brought against Georgia State University, and it is nice to see my opinion supported by the Court of Appeal for the same circuit in which the GSU case is being heard.

I am not so happy, however, with the conclusion that fair use, as an affirmative defense, cannot be raised *sua sponte* by a court. In general I do not have a problem with the principle of civil procedure — called Rule 8 — that says that a defense is waived if it is not asserted by the defendant in their answer or similar initial pleading. It is interesting, however, to note that fair use is not on the list of affirmative defenses mentioned in Rule 8; if it were there would not have been a controversy. But that exclusion makes sense, because fair use, although it functions as an affirmative defense, really plays a different role in the copyright statute.

An affirmative defense is one in which the defendant admits the actions complained of, but pleads additional facts that excuse those actions. Many potential defenses, of very different characters, thus function affirmatively. Rather than compare fair use to an obvious affirmative defense like a statute of limitations, I want to suggest an analogy from the law of real property.

Suppose my neighbor and I disagree over the extent of my property. When I build my garage on the disputed strip of land, my neighbor may well sue me for trespass. My defense — that I did build the garage as alleged but that it is not my neighbor's property and therefore no trespass — will look a lot like an affirmative defense. But in reality the assertion is that there was no trespass because of the boundary on my neighbor's property and, therefore, on his rights. Fair use, I suggest, is really a limitation on the rights held by a copyright holder; a boundary line on his or her property, if you will.

This, of course, is the plain reading of the fair use provision in the copyright statute — a fair use is "not an infringement." The defendant-appellees in the *Latimar* case made this point, arguing that the clear language of the law shows that fair use is, essentially, a boundary to a copyright that courts are required to recognize even if it is not asserted by the defendant. Unfortunately, the 11<sup>th</sup> Circuit conflated this argument with another one made by the defendant and then refuted the second argument without ever addressing this first, much more compelling, point.



I have argued before that real property law, much beloved by copyright maximalists for its draconian language about theft and piracy, actually can be a fruitful analogy for discussions of intellectual property law ***if and when*** the extensive limitations and exceptions on real property claims are recognized. The analogy between fair use and the boundaries that limit real property claims is one such point, and it suggests that courts can, and probably should, consider fair use and raise it on their own when it is appropriate but not asserted by a defendant.

# Wishful thinking at bar

*Mon, 19 Apr 2010 08:19:54, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]*

There has been a discussion recently on the excellent e-mail list that has developed around Cornell University's [Institute for Computer Law and Policy](#) about the Georgia State University lawsuit, in which GSU is being sued for alleged copyright infringement. One of the points made is that the infringement allegations involve both electronic reserves administered by the GSU libraries and readings provided to students directly by faculty using the campus course management system. So this is really a thoroughgoing assault on universities' provision of course content for students under a fair use claim.

The discussion has led me to consider what outcome the publishers are seeking here and whether a ruling against fair use, which would clearly be disastrous for educational institutions, would actually be good for academic publishers.

The answer to the first question — what do the publishers want — is pretty easy. They are seeking a massive increase in the revenue they get from permission fees. If every e-reserve or course management use of even small excerpts from copyrighted works actually generated a royalty payment, publishers would get a windfall. But that is a very big “If.”

First, it is important to understand that the current permissions market does not work well, especially when the reality is compared to the glowing descriptions of it found in the publishers' filings with the court in the GSU lawsuit. I have written before ([here](#), for example) about the problems regarding whether or not the Copyright Clearance Center actually has the rights it is selling. But I also believe that the pricing of permission fees indicates a huge market failure.

Today I asked our e-reserves staff to give me some random examples of permission fees that we have recently paid, from which I will select two. For the 2007 book “No Caption Needed,” we paid \$150 for permission to make just 17% of the work available to 12 students. This amounts to over \$12 per student to gain access to less than 1/5 of a work which sells for \$35 retail. For an older work — “Dealing with Terrorism — Stick or Carrot?” from 2003 — we paid about \$10 per student to make 21% of this \$30 book available. These are not extreme examples; in fact, one of the samples fees exceeded \$1,000 — over \$25 per student. Such costs are particularly egregious when one realizes that, by percentage, permission costs are higher than retail prices, that there is no marginal cost for the publisher involved and that these fees only authorize access for a single semester. So, as we are asked to pay ever-increasing costs for decreasing value, it seems that an unsustainable system is being created.

If the publishers were to get a favorable (for them) ruling in this case, I think we can anticipate one of three responses from colleges and universities, none of them actually in the long-term interests of publishers.

First, some schools might elect to shut down their e-reserves systems, curtail what faculty can do in course management systems, and simply live with the reduced availability of teaching materials. This would be a strong option, I am afraid, for many smaller institutions, and it would be very bad for education. Indeed, that is precisely the specter raised by Gustavus Adolphus Librarian Barbara Fister in this [recent article from Library Journal](#). This course would cause whatever income publishers are now deriving from those schools to dry up. Worse, it might foster the development of peer-to-peer sharing of “home-made” scans of readings amongst students, which would exacerbate the present situation by

removing the element of “adult supervision” that makes fair use decisions (even when they are ones with which publishers disagree) and pays for permission when fair use is not applicable.

Second, schools could decide to impose a student fee to pay for the sudden increase in permission fees. Some of the plaintiff’s court filings suggest this as an appropriate alternative. Leaving aside the loud objections from students, this would likely also get the attention of Congress, which is already concerned about the cost of higher education. Recent laws have required us to report on the cost of textbooks; see Fister’s article, as well as [this story](#) about students opting for cheaper alternatives or, frighteningly, just foregoing textbooks entirely. A new fee for access to digital teaching materials would seem to make Congress’ worst fears come true. Indeed, in the long run, this could be a good outcome for higher education, if Congress were moved to create a provision for compulsory licensing for educational uses and place the task of setting prices in the hands of the Copyright Royalty Board. Then, at least, we would get controlled and predictable permission fees.

Finally, some institutions would probably use money from their collections budgets, where there is still money in collection budgets, to pay for permissions. This, of course, is robbing Peter to pay Paul; the net gain for publishers is minimal, but the cost to society is great. Increased permission fees for material that is already published and available will inevitably decrease the monetary incentives for new authorship, since it will further constrict the market for such new works. It is cheaper, of course, for publishers to collect fees on older works than it is for them to actually bring new works to market, but the entire copyright incentive is undercut by that logic.

Without an outcome in sight that would genuinely benefit the publishing industry, one has to conclude that the primary force driving this lawsuit is either emotionalism based on an unfocused sense of ownership violated — “It’s mine, its mine,” as children sometimes lament — or, at best, on purely wishful thinking.

# Whither the Supreme Court?

Fri, 23 Apr 2010 10:09:48, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]

The direction of the Supreme Court is on many people's minds these days, following the announcement that Justice John Paul Stevens will retire, even though most people admit that his replacement will not sway the political alignment of the Court very much.

One area that is always unpredictable is intellectual property law, because the usual distinctions between liberal and conservative, Republican and Democrat, simply break down. A case in point is the famous decision in the *Sony "Betamax"* case that found that home video recording was fair use. Justice Stevens wrote the majority opinion in that case, which transformed personal technology use and launched a huge revenue stream for the movie companies in spite of their own attempts to suppress the VCR. In that decision, Stevens was joined by unlikely allies, including Justices O'Connor, White and Burger. Equally strange bedfellows — Justices Marshall and Rehnquist — found themselves in agreement in the dissent.

The *Sony* decision had a greater impact on the everyday lives of Americans than many people realize. It is nearly impossible to imagine what life would be like today if the courts had issued an injunction against the marketing of VCRs, which was the remedy the movie industry first requested. By the time the case reached the Supreme Court an injunction was no longer on the table, but the impact of Steven's decision was still immense, and it is cleverly expressed in the title of this piece by Jonathan Band, "[Justice Stevens Invented the Internet](#)." Jokes about Al Gore aside, this title is not really hyperbole; as Band points out, without the *Sony* decision, the development of the Internet would have been greatly impeded. A similar point, with a lot of additional detail about Steven's other IP decisions and how the majority in *Sony* was formed, is available in this [article about Stevens from the Corporate Counsel site](#).

So it is hard to predict how a replacement for Justice Stevens will influence the court on copyright matters, and it will probably remain hard even after we know the name of the nominee. One thing that is certain is that there will be a copyright case before the Court when it opens its next term in October 2010. Last week the Court finally granted certiorari in the case of *Costco v. Omega*, about which [I wrote last year](#). There are some up-to-date details on the case [here on the Exclusive Rights blog](#), but the basic controversy is about whether or not the US "First Sale" doctrine applies to distributions in the United States of copyrighted material that is manufactured overseas and by a foreign company.

There are two very interesting things about this case. First, the Court initially could not decide whether or not to hear the case, and they asked the Solicitor General of the United States for an opinion. Late last month she (Elana Kagan, herself apparently a contender to replace Stevens) [recommended that the Supremes not hear the case](#), essentially suggesting that the lower court opinion that I and [others](#) fear could have some very negative effects be left in place. It is odd for the Court to act so quickly in defiance of advice they had sought. The other interesting thing is that the library community was split on whether or not to file a brief on the cert issue. Now that the case has been accepted, it will be interesting to see how the library associations line up on the issue, and what they choose to do. If readers want details so they can form an opinion about what the best course might be, there is lots of information in the links above.

# Act 2 of the ACTA controversy

*Thu, 29 Apr 2010 07:47:32, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: technologies]*

When I [last wrote](#) about the Anti-Counterfeiting Trade Agreement, or ACTA, it was primarily to complain about the secrecy in which the negotiations were taking place. Earlier this month, however, the US Trade Representative (who had opposed release) finally caved in to pressure from at home and overseas and agreed to the release of a [draft of the proposed agreement](#). Much of the released text is in square brackets, indicating that full agreement has not been reached, and there are several points where different options on a particular matter are outlined. Nevertheless, enough is now clear about ACTA to be quite sure that the complaints raised before the release were fully justified. Now the issue is not simply that we do not know what is in ACTA, it is that what is in ACTA is a series of very bad ideas.

One of the most reliable guides to ACTA continues to be Canadian law profess Michael Geist, who discusses some of the provisions and the problems with ACTA in [this blog post](#) and in a [video which can be found here](#). Geist points out very effectively that, in spite of assurances, ACTA is not just about enforcement of existing IP law but would mandate substantive changes in national IP laws. Also, as he explains, it is not just about commercial infringement, regardless of what we have been told. More about that in a minute.

One of the frequent claims about ACTA is that it would mandate a “three strikes” regime that would require ISPs to “terminate” subscribers after repeated accusations from the content industries that that user had committed infringement. Such termination would occur without judicial process. Defenders of ACTA have insisted that these claims are not true, and now we can see what they meant. The released text does not **require** termination, but it does offer a safe harbor for ISPs, such as we have in the US, only if the ISP implements security measures. The only example given of an acceptable security measure, of course, is a three strikes termination procedure.

To organize a summary of the issues raised by the draft ACTA text, I want to look at two groups of problems, one procedural and one substantive.

Procedurally, ACTA is a blatant attempt to remake IP law without having to involve either the World Intellectual Property Organization (WIPO) or the United States Congress. It appears that the WIPO does not please the IP industries because of its transparency and because of the attention it pays to the needs of developing nations, for whom high and impenetrable IP barriers are not conducive to growth. These industries pull the strings of the U.S. Trade Representative, and an international agreement is born that is negotiated in secret and would set up an oversight structure independent of the WIPO. As two law professors point out in [this editorial from the Washington Post](#), the agreement, with its substantive changes in national copyright law, would also seem to violate the US Constitution if it is approved here as an executive agreement without the involvement of Congress.

It is constitutional concerns that also frame my substantive objections to ACTA, since many of the things it would require signatories to enact in their national laws seemed to conflict with the Fourth, Fifth and Sixth Amendments to the U.S. Constitution. By agreeing to ACTA, the U.S. would derogate due process and substantive civil rights in regard to this one area of law. The best analysis of these problems can be found in a two part post by Margot Kaminski, [here](#) and [here](#) on the Balkinization blog, but I will offer a brief catalog here.

In the first place, the three strikes termination provision discussed above would result in citizens being disconnected from the Internet on the basis of mere accusation. This is a significant reduction in the usual standard of evidence for a claim of infringement. And ACTA has provisions that would increase the level of remedies available a great deal; termination would only be the beginning. When there is a court proceeding, the damages could be based on any “reasonable” valuation suggested by *the rights holder*.

In addition, rights holders could seek injunctions without involving the other party; so-called *ex parte* injunctions would be available. Finally, there would be several provisions allowing seizures of allegedly infringing property, including authorization for border agents to seize material at the request of rights holders. This provision would make the U.S. Border Patrol into a sort of private police force working for the content industries, but at taxpayer expense.

The most troubling provision, I think, is where ACTA would require the U.S., and other signatories, to increase the criminal penalties for willful infringement. The U.S. already has such penalties, but the ACTA standard would expand the definition of “willful” to explicitly include private, non-commercial copying if done on a large scale. And ACTA says that criminal penalties “shall include” the possibility of prison. Not satisfied with million dollar judgments against private citizens who share unauthorized movie and music files, the content industries now want to send them to prison.

Many of the enforcement provisions of ACTA would substantively alter U.S. law and would provide a heavy advantage to plaintiffs, one that is not available to those bringing other types of claims. We are being asked to change our law in a way highly advantageous to one special interest based on an agreement negotiated in secret and without any of the legislative checks and balances that would normally be in play. If the office of the U.S. Trade Representative thought that releasing this draft text would put an end to controversy, they were badly mistaken.

**Pre-publication update:** After this post was written, the Library Copyright Alliance released this [analysis of ACTA by Jonathan Band](#). It is well worth reading for those who would like a sustained analysis of the continuing problems with ACTA.

# Catching up with the First Amendment

Fri, 07 May 2010 08:40:48, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

Note — This post is written by Will Cross, this year's intern in Duke's Scholarly Communications office. Will is an attorney now in library school, and comes to copyright law from a deep commitment to First Amendment values.

Last August [Kevin wrote about](#) the lawsuit between author J.D. Salinger and the author of a new book; *Coming Through the Rye*. This work, which uses the interplay between a 76 year-old character named "Mr. C" (a clear allusion to Salinger's Holden Caulfield, now grown old) and Salinger himself to create a work of "meta-commentary" on the relationship between the famous author and his iconic creation, was originally found to be an infringement of Salinger's *Catcher in the Rye*. Last week Kevin and I were delighted to see that the Second Circuit had reversed the district court's decision until we read [the opinion](#).

Rather than reconsidering the fair use and First Amendment issues raised by the [amicus brief](#) that Kevin discussed, the court rejected fair use and remanded based only on a procedural issue. Although [Rebecca Tushnet suggests](#) that the opinion includes some "nice language" about the First Amendment issues, I came away from the case very disappointed.

The opinion seems to give short shrift to the fair use argument itself, particularly since this seems to be exactly the sort of literary "criticism or comment" at the heart of fair use. [As another commentator has noted](#), it also illustrates just how slippery and troublesome it can be to draw legal distinctions between "criticism" or "parody" (which are clearly fair use) and "satire" or unauthorized "derivative works" (which are not). As books such as this and [The Wind Done Gone](#) make clear, the line between protected parody and unprotected satire can be difficult to measure, particularly for judges whose expertise may not include literary criticism or analysis.

My larger concern, however, is what cases such as this may mean for free expression. If an author can stop comment on his work or [an investment bank can get an injunction from criticism based on trademark](#) then IP laws designed to promote creation and discussion begin to serve the opposite purpose.

Scholars such as Neil Netanel have argued for years that this tension is significant and due greater consideration by courts, who generally defer to Congress in this area. As Netanel notes in his seminal article ["Locating Copyright Within the First Amendment Skein"](#), courts have generally been unwilling to directly address the relationship between copyright and the First Amendment based on three presumed "safety vales": copyright's limited term, fair use, and the idea/expression dichotomy.

In 2001 Netanel argued that that these protections may be insufficient to safeguard the interests implicated by turning public expression into private property and since then things have not improved. The copyright term has been extended by Congress and the *Eldred* Court suggested that such extensions may stretch to "forever minus a day." Scholars such as Yale's Jed Rubenfeld have [demonstrated the ongoing difficulties](#) with putting the idea/expression dichotomy into practice. And cases like this one suggest that fair use itself may be insufficient to protect expression, particularly where copyright boundaries are unclear or one party is more respected or sympathetic than the other.

Of course the Second Circuit's decision may be appealed and [some commentators have suggested](#) that this case may lead to a mandatory licensing scheme similar to music rights. But whatever the outcome, copyright's effect on free expression must be taken seriously as an interest protected by the Constitution and resting at the heart of the law and policy that under girds copyright itself.



# Policy consequences

*Thu, 13 May 2010 15:09:19, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories]*

We are trained these days to dread “unintended consequences” whenever we make decisions; it is a fear that sometimes leads to paralysis. But not all unintended consequences are negative, and I want to take a moment to celebrate some unexpected things that have resulted from the [adoption of an open access policy](#) by the Duke University faculty back in March.

The two biggest consequences so far have been a flurry of activity in the Duke Libraries and some welcome attention from outside the University.

In the latter category, [this interview with Paolo Mangiafico](#), which was posted recently on [opensource.com](#), is a superb summary of the rationale behind the policy and the steps we are taking to implement it. Paolo, in his rather unique position at Duke as Director of Digital Information Strategy, provided the leadership that was necessary to organize, draft and advocate for the open access policy. Paolo himself is a unique combination of high-level IT skills with a deep understanding of policy options and consequences, and his description of our OA policy is as articulate as any I have seen.

In the interview, Paolo talks about the decisions that must now be made, both as a matter of technological infrastructure and in terms of re-imagining library services. Thus his interview nicely encapsulates the reasons behind that flurry of activity I spoke of above.

Another particularly exciting consequence for me personally has been an invitation to speak at the the [8th Berlin Conference on Open Access](#) on the legal issues involved in open access. The invitation letter clearly indicates that Duke’s new policy is one of the reasons for this opportunity, and I am honored to be invited to this influential gathering, which drafted the [Berlin Declaration on Open Access](#) back in 2003. In 2010, the Berlin Conference will be held in Beijing, China, which deepens my excitement, both because I have never been to China and because of the opportunities the conference offers to learn about the progress of the open access movement in Asia (although the activities of [SPARC Japan](#) are already well-known). I hope I shall see many friends from North America and Europe in Beijing, and I look forward to the opportunity to meet many new colleagues and friends.

Sometimes unintended consequences offer really delightful surprises.

# Facing the Future of Social Media

*Tue, 18 May 2010 13:46:34, ksmithl2@duke.edu, [category: scholarly-publishing, category: technologies, category: user-generated-content]*

By Will Cross

As a scholarly communications librarian I am naturally excited when scholars embrace a promising new method of communication. As such, I was delighted to see [this new study published in the Chronicle of Higher Education](#). Although academia is just scratching the surface of social media use, this study of almost 1,000 professors indicates that roughly 80% are already using social media and about one-third use social media to communicate directly with peers and students.

Of course this blog provides one vital (in every sense) example of such communication, but more interactive tools such as Facebook are also being used by [libraries](#) and [scholars](#) to promote academic discourse. Even Twitter has recently been used to address scholarly issues, as with the [recent coordinated protests against ACTA](#). Scholars have also begun to study Twitter as a [source of data for scholarly analysis](#) similar to telephone surveys. These nascent uses certainly do not present an imminent threat to replace traditional scholarly discussion and publication, but they do suggest the potential for new forms of communication among scholars that can act as a valuable adjunct.

As we enter this brave new world, however, we must be cautious; moving scholarly discourse into digital and commercialized spaces has costs that come along with the benefits. The most visible example of this fact is the recent conflict over Facebook's privacy settings. As the [Electronic Frontier Foundation's Timeline](#) describes, what began as a private tool for communication among friends and colleagues has essentially been transformed into a clearinghouse of personal data that is being mined and sold en masse to advertisers. This has occurred based in large part on changes in the "default" settings, well-illustrated by [this graph](#), and compounded by the fact that personal information continues to be made available and mined [after it is removed from a user's page and even when a user quits Facebook altogether](#).

Facebook is the most publicized offender, but more traditional "new media" present similar problems. As ebook readers pop up on iPads and Android phones it has been revealed that [ebook reading habits, personal annotations and highlights are being recorded and aggregated](#). Even scholarly darling Second Life has been the subject of [a recent class action lawsuit over ownership of content created within the "virtual world."](#) This is similar to Facebook's ill-fated 2009 claim to ["perpetual worldwide ownership" of all content](#) that was eventually rescinded when users revolted.

As scholarly communication, and perhaps eventually scholarly publishing, moves into these new arenas we must decide how to respond to these challenges to personal privacy and authorial ownership. Some have argued for an [open alternative to these commercial entities](#) that must, at the end of the day, focus on their bottom line rather than social or scholarly good. At the same time, [businesses are looking to technology to control access and retain all information](#) in social media.

Along with these technological solutions many groups are focusing on providing users with information. The American Library Association has put out an excellent [video called "Choose Privacy"](#) that aims to educate users about these issues so that they may make informed decisions. Business Week's [list of Ten Reasons to Delete Your Facebook Account](#) goes a step further to argue for a specific action.

However we address these issues we must be cognizant of how social media change the norms of expression. The Scholarly Kitchen has an [excellent discussion of social media and privacy](#) that highlights the way social media such as Facebook are transforming social norms about privacy. Since these norms themselves influence privacy law and the Fourth Amendment's [complex and often-misunderstood "reasonable expectation" test](#), today's social practices may drive tomorrow's legal changes.

At the same time, the Scholarly Kitchen article cites [a study describing the necessary tradeoff between sharing information and sacrificing some privacy](#). The challenge for scholars and librarians, I would argue, is to find a balance that permits the appropriate sharing of information but retains the privacy and ownership values necessary for intellectual exploration, reflection and creation. As is so often the case with new modes of expression, we must be careful to import the social, cultural and legal norms of scholarship that we need while leaving room for new opportunities to flourish.

# Transformation and teaching

*Fri, 21 May 2010 13:29:28, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use, category: user-generated-content]*

On Wednesday the Duke Libraries' Instruction and Outreach department held a [retreat on the topic of "Digital Literacies."](#) The excellent keynote speaker for the event was Ellysa Cahoy from Penn State University. As part of the retreat, I spoke very briefly about copyright issues around the use of digital media. My comments ended up being very different than what I originally planned, based on the things I heard from Ellysa and the Duke faculty who participated in a panel talking about the kinds of new media assignments they were using. Ellysa has some kind words about the retreat in general, Duke's superb instruction librarians, and my remarks in [this blog post](#). On that latter topic, I want to take a minute to clarify and expand on what I said, because I believe the message is quite important.

As Ellysa says, my fundamental message was that faculty who are using creative assignments involving new media, and the librarians who work with them, need to embrace the space given to them by fair use. I hasten to add that I did not say that they should "not worry about using copyrighted material," but I did encourage a degree of reflection about the nature of the use in question. Events like the [lawsuit against Georgia State](#) over electronic reserves and the news coverage about the [conflict between UCLA and AIME over streamed digital video](#) have a tendency to make librarians very nervous about all uses of copyrighted works. But all uses are not the same; our courts have been very receptive over the past three decades to uses that are perceived as "transformative."

Transformative uses are, broadly speaking, uses of copyrighted works which create something new that has a different purpose than the original work involved. Transformative works are often identified as those which do not create any kind of market competition with the original work. Thus a [parody of a 1950's classic song](#) by a 1980's rap group is a transformative use of the original, and an [historical work about the Grateful Dead](#) makes a transformative use of original concert posters for Dead concerts when it uses them to illustrate a time line. One does not buy a history book instead of attending a concert, nor does one buy 2 Live Crew's music as a substitute for Roy Orbison's (although a truly eclectic music fan might buy both). In a fair use analysis, transformativeness strengthens the argument for fair use based on both the first fair use factor — the nature and purpose of the use — and the fourth factor — the effect of the use on the markets for the original.

When students (or faculty) use media like film, music and video clips to create remixes, mash-ups and other kinds of commentaries, this is a strong example of fair use. These uses are quite different than the largely iterative ones like scanning a book chapter for e-reserves or streaming a video through a course management system. These may or may not also be fair use — that is a highly controversial issue — but they are very different from creative and transformative uses. When I realized that the retreat was discussing such student assignments as using advertisement illustrations in "story board" essays about popular culture or re-mix film and music clips to create PSAs for local non-profits, I changed the focus of my remarks from warnings about iterative uses to encouragement of these transformative ones. To my mind, these kinds of uses, where new scholarly and social valuable works are being created, are at the heart of the rationale for fair use in our law. While copyright law often seems to inhibit pedagogy, this is one area in which the normative interpretation of fair use offers strong support for creative teaching.

One thing I wanted to stress about transformative use and student assignments was the way in which the fair use analysis actually encourages good scholarship. It seems clear that the more integrated copyrighted material is into the basic argument or message of the new work, the stronger the argument

for transformative fair use will be. To take one example, music added to a student-made video simply to produce a more pleasing product is much less likely to be fair use than music which contributes to the overall theme of the work in a direct way. Thus, a conversation with student and faculty creators about copyright and the importance of thinking through the fair use analysis is not only valuable in itself, it can actually support the creation of better, more coherent scholarly work.

# Connecting the dots

*Thu, 27 May 2010 10:25:16, ksmithl2@duke.edu, [category: international-ip]*

Several months ago we [discussed an article](#) about international copyright that suggested the possibility that the developing countries who are part of the World Intellectual Property Organization (WIPO) could seek to reverse the trend toward harmonizing IP protections at a very high level by “de-harmonization.” Such de-harmonization would be directed at exploiting the space provided for limitations and exceptions in the major international copyright agreements in order to benefit local circumstances. That article focused on the three fastest growing economies in the developing world — Brazil, Russia, India and China — the so-called BRIC countries.

Now comes [this news release announcing](#) that India and Brazil, along with 16 other countries from the developing world, have grouped together to more effectively represent the needs of such countries at WIPO. As the announcement says, these 18 countries “aim to transform the World Intellectual Property Organization... [in]to a U.N. agency helping members achieve development goals through a balanced and calibrated use of intellectual property.” It sounds like these nations are taking to heart the advice that the WIPO and WTO treaties and agreements leave them room to adjust policy in ways that best suit their own needs, rather than accepting a “one size fits all” approach that favors the rich, content-producing nations. The news release goes on to complain that strong intellectual property rights protections are being used to deprive people of needed medicines and to “steal developing countries’ traditional knowledge.”

These complaints are familiar to those who follow the negotiations at WIPO even in a cursory fashion, and there has been a new emphasis in recent months on the “[Development Agenda](#)” at WIPO and on how to redress the balance between protection of existing rights and access necessary for development. The formation of this new block within WIPO is clearly an effort to move the organization along this path more quickly.

The timing, however, also makes it very hard to ignore that this new IP group, as well as the emphasis on development that it has been formed to foster, is one of the major factors in the decision by a number of developed nations to forgo WIPO negotiations in favor of the “pluri-lateral” approach being taken with ACTA, the Anti-Counterfeiting Trade Agreement. [As we have explained before](#), the ACTA treaty is being negotiated amongst a group of wealthy nations outside of the WIPO process. Such negotiations are allowed by the WIPO treaties, although it is debatable if such sweeping tightening of IP enforcement was ever envisioned when those agreements were negotiated. In any case, [Michael Geist](#) and others have argued that ACTA was born out of frustration with WIPO and the attention that was being paid there to the concerns of poorer countries who fear that rigid enforcement regimes will stifle their economic growth.

The specter raised by these developments is a fragmentation of the international IP community, with rich nations negotiating only amongst themselves for ever stronger measures to enforce intellectual property rights and developing countries talking only to themselves at WIPO about how such enforcement stifles growth and threatens lives. When we connect the dots that these developments represent, it is an unfortunate and even frightening picture that emerges.

# Justice Stevens caught in the copyright crossfire

Wed, 02 Jun 2010 08:23:14, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]

By Will Cross

About a month ago Kevin wrote about the retirement of Justice Stevens and quoted an excellent article called "[Justice Stevens Invented the Internet](#)." It argued that the development of the internet relied on Stevens' opinion in the [Sony Betamax case](#), and the standard it established that, so long as a device is "capable of substantial non-infringing uses," the manufacturer of the device cannot be liable for infringing copies made by consumers with the device.

I could not agree more with this argument and to Justice Stevens' credit I would add his majority opinion in [Reno v. ACLU](#), which welcomed the Internet under the aegis of the First Amendment and struck down a requirement that "adult" online expression must be sent exclusively to users over the age of 18, a requirement Stevens noted would be technologically impossible to comply with. Given that technological barriers will not work, the only alternative is to simply limit expression. Regulation, Stevens wrote, may not "reduc[e] the adult population . . . to . . . only what is fit for children."

Taken together, these cases established the legal framework that supports the internet as an open and free medium where users are protected from liability for unforeseen bad or inappropriate uses of expression made by others. Technology and expression must be taken on their own terms, even if third parties subvert them for bad ends.

Unfortunately, this principle of an open internet has been steadily eroded by blowback from copyright firefights, particularly one that arose even as Stevens was drafting *Reno*: file sharing.

After a decade of [fruitless lawsuits](#) and [on the heels of another legal victory](#), this time against file sharing service Limewire, content owners are [gearing up for yet another round](#) of lawsuits this week. The problem with this bellicose response to file sharing is that Justice Stevens' open internet is increasingly caught in the crossfire.

This response to file sharing has taken a [significant toll on the efficiency of the legal system](#) and has bent the law badly out of shape. As Eric Goldman's blog, cited above, notes, "there is 'normal' copyright law and then 'P2P file sharing' copyright law, and it's a mistake to think those two legal doctrines are closely related." Content owners have repeatedly pushed for extreme, or simply non-legal, readings of copyright and fair use, most famously in the [Lenz case](#) dealing with bogus takedown notices (and a dancing baby) and the [recent Jammie Thomas case](#) dealing with excessive statutory damages. They are also attempting to [rewrite the already draconian DMCA](#), an irony matched only by the sublime absurdity of content owners [suing one another over pirated anti-piracy technology](#).

More troubling, these lawsuits have also begun to target not only users but service providers. Content owners have been [overburdening ISP's with automated discovery requests](#) for years and have recently begun to [attack ISP's directly](#). They have also [sought an injunction against the bandwidth provider for file sharing service The Pirate Bay](#), essentially arguing for fourth party liability.

This erosion in Justice Stevens's principle of an open internet reached a new low with a California court's recent injunction against BitTorrent search engine IsoHunt [requiring it to remove all links pointing to infringing files](#). This, of course flies in the face of Stevens' principle about non-infringing uses and requires IsoHunt to have the same infeasible knowledge and control over users as was struck down in *Reno*. If the Pirate Bay case is the equivalent of suing AT&T for an obscene caller's ramblings then this case is akin to requiring that Sprint disconnect anyone whose phone *might* be used for unlawful acts even *before those acts have been identified as unlawful*. It cannot be done and the only alternative is to shutter the technology completely or simply bend over backward to accommodate any and all measures litigious content owners may seek to employ.

This also ignores the substantial non-infringing uses of file sharing services similar to those that saved the VCR in *Sony*. These uses include an increasing number of academic uses. Kevin [discussed the potential cost of attacking file sharing to higher education in a 2007 post](#) on this topic and since then file sharing continues to be used to transmit academic materials including [textbooks](#) and [journals](#). Many universities have begun to move this sharing into an authorized practice with a service called [iTunesU](#) that facilitates academic sharing. Under pressure from content-owners, however, and despite the developing market for academic file sharing, [Oxford University has banned all file sharing](#), even that which explicitly legal. With [ACTA's](#) heavy artillery on the horizon the firefight only seems to be escalating.

Again, illegal file sharing is a real problem but the current move to eradicate anything that might be used unlawfully is in danger of reducing Justice Stevens' open internet to "only what is fit for children." The war against file sharing is harming legitimate uses such as academic sharing and has an [economic cost](#), and a [cost to public safety](#). It also has a cost to public knowledge, as poetically illustrated by [Princeton's demand that web sites remove the senior thesis of Justice Stevens' replacement Elena Kagan](#), in order to protect Princeton's market to sell the public writings of the next Justice. With technology and expression in the cross-hairs even an unlikely total victory against illegal sharing seems to offer at best a Pyrrhic one for scholarly communications and society.



# Literary borrowing

*Fri, 18 Jun 2010 13:56:33, ksmithl2@duke.edu, [category: fair-use, category: public-domain, category: scholarly-publishing]*

Pure chance recently put a copy of the “Sketch book” by Washington Irving into my hands, and I have been enjoying rereading classic stories and discovering ones that were previously unfamiliar. In the latter category is “The Art of Book Making,” in which Irving describes a desultory trip to the British Museum and his fascination with watching putative authors as they devour earlier works in order to create their own. I have commented before on the need for authors and other creators to have useful access to previous works in order to create new knowledge and literature. Isaac Newton’s famous phrase about “standing on the shoulders of giants” often springs to my lips. But I could never match the eloquence and humor of Irving’s description of, and justification for, literary borrowing — especially the image of mushrooms springing from a rotting tree trunk — so I will, for the remainder of this post, simply allow him to speak:

After all, thought I, may not this pilfering disposition be implanted in authors for wise purposes; may it not be the way in which Providence has taken care that the seeds of knowledge and wisdom shall be preserved from age to age, in spite of the inevitable decay of the works in which they were first produced? We see that nature has wisely, though whimsically, provided for the conveyance of seeds from clime to clime, in the maws of certain birds; so that animals, which, in themselves, are little better than carrion, and apparently the lawless plunderers of the orchard and the cornfield, are, in fact, nature’s carriers to disperse and perpetuate her blessings. In like manner, the beauties and fine thoughts of ancient and obsolete authors are caught up by these flights of predatory writers, and cast forth again to flourish and bear fruit in a remote and distant tract of time. Many of their works, also, undergo a kind of metempsychosis, and spring up under new forms. What was formerly a ponderous history revives in the shape of a romance—an old legend changes into a modern play—and a sober philosophical treatise furnishes the body for a whole series of bouncing and sparkling essays. Thus it is in the clearing of our American woodlands; where we burn down a forest of stately pines, a progeny of dwarf oaks start up in their place; and we never see the prostrate trunk of a tree mouldering into soil, but it gives birth to a whole tribe of fungi.

Let us not, then, lament over the decay and oblivion into which ancient writers descend; they do but submit to the great law of nature, which declares that all sublunary shapes of matter shall be limited in their duration, but which decrees, also, that their elements shall never perish. Generation after generation, both in animal and vegetable life, passes away, but the vital principle is transmitted to posterity, and the species continue to flourish. Thus, also, do authors beget authors, and having produced a numerous progeny, in a good old age they sleep with their fathers, that is to say, with the authors who preceded them—and from whom they had stolen.

# The Worm at the Core (and several mixed metaphors)

*Mon, 14 Jun 2010 10:19:37, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Last week, I was a last minute substitute speaker at a “Master’s Class” for mid-level managers in the [STM publishing business](#). I was invited to speak on “The Battle for Copyright and Digital Rights” opposite Mark Seeley, who is a Senior VP and Legal Counsel for Elsevier. That Mr. Seeley was a kind and gracious “opponent” was not a surprise, nor was it surprising that we reached a state of civil disagreement on some copyright issues. What did surprise me, however, was the fact that the members of the class were less interested in the copyright issues we raised than they were in talking about open access and, especially, the motivations that led Duke’s faculty to adopt [an open access policy](#). Many of them seemed to be working hard to wrap their minds around the idea that faculty authors would elect a distribution system that bypassed, or at least paralleled, the traditional publication system.

The day after this discussion came the [announcement from the University of California](#) that they felt pushed to cancel their contract for digital resources with Nature Publishing Group and to ask their faculty to decline to submit to, or edit or review for, NPG publications. Dorothea Salo has a [great blog post about this situation in which she muses about worms turning](#). Indeed, this kerfuffle does suggest that things are changing quickly in the way scholars distribute their own work and get access to the work of others. Dorothea’s point (albeit with her metaphors of turning worms and pierced veils getting rather mixed) that the last veil being pierced in this argument is about journals as non-substitutable goods is an excellent one. Dorothea quotes a UC scholar as saying that where a work is published these days really doesn’t matter much, and notes that this is a huge disruption in the norms we have come to rely on.

For me, the coincidence of these two events really suggested a fundamental truth that has not been well articulated in the debates about scholarly communications; what I have called the worm at the core, to appropriate Dorothea’s original metaphor. From both the publishers’ side, illustrated by reactions at the STM class, and from the scholars’ side we are seeing a growing awareness that the publishing industry needs scholarly authors much more than scholarly authors need traditional publication, at least for distribution of and access to scholarship. This is a big worm eating at the core of the traditional environment for scholarship, and the sooner we come to terms with its implications, the better. Open access policies and outlandish pricing policies at journals are both pushing us in a new direction, and it is really incumbent on scholars, and the libraries that serve them, to manage the journey.

# Pirate Marketing?

Thu, 24 Jun 2010 15:29:23, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing, category: user-generated-content]

Let me start with a confession; I have never seen the TV show *Glee*. But lately I have heard a lot about it, from the odd perspective of copyright law. In this [blog post by Christina Mulligan](#), the copyright consequences of practices that are taken for granted in *Glee* are tallied up. Apparently the cover performances, music videos and remixes could result in millions of dollars of liability if done by real high school musicians.

As Mulligan points out, there is no attention to copyright issues as these teenage performers go about making their music. They “see so little wrong with this behavior that the word ‘copyright’ is never even uttered.” In this way, *Glee* is a telling illustration of where we are as a culture; what a small group of entertainment industry executives would insist is stealing is everyday practice for many real-life consumers and performers. Copyright only really works to protect the big name writers and performers; for so many lesser-known musicians and for millions of consumers it is merely a hindrance or, perhaps even worse, a non-issue.

It should be noted that Mulligan does not consider the possibility that fair use might actually support her contention that “remixing isn’t stealing,” even if industry lawyers would disagree. But the larger question is really whether copyright is doomed to irrelevance in the remix culture. Is all lost for those who believe that copyright has some important function (however defined) in incentivizing new creation? If so, is what we gain by the demise of copyright compliance greater than what we lose?

Perhaps there is a middle ground, as illustrated by [this remarkable letter](#) written by [media consultant](#) Brian O’Leary to incoming Author’s Guild president Scott Turow. O’Leary cites the research done by his own organization, Magellan Media, which found “an apparent correlation between piracy and a subsequent growth in paid sales.” O’Leary is not, I don’t think, suggesting that the content industry should encourage piracy, even if such a thing were possible. But he does suggest that it is counterproductive to fight piracy too aggressively, since “discovery, even using a pirated file, may lead to more sales.” In short, the natural tendency of the kids from *Glee* may not be a death knell for the content industries, but an opportunity to refine their business models and consider how to maximize discoverability while still offering added value that will lead to sales. I was particularly struck by one specific warning that O’Leary offers, that publishers should not undermine discovery (and frustrate consumers) by delaying the release of e-book versions in order to prop up print sales; the e-books, even when distributed without authorization, may themselves support print.

In all this I think there are two lessons for those of us interested in copyright and, especially, in scholarly communications.

In regard to copyright, these two very different communications reinforce the point that the terms “piracy” and “theft” are much too blunt instruments for this discussion. Piracy has a long history in intellectual property, but it should be reserved for large-scale commercial interference in the marketplace. The attitude toward remixing and other non-commercial, personal uses of media needs a different term that takes account both of the ubiquity of such uses and their potential. How about “opportunity?”

For academics, the important message is that there are lots of venues for distributing our work and the most important criteria should be discoverability. As the original rights holders in scholarly works, faculty authors do not have the same concerns about so-called piracy that the movie and music industry has, for example. We are free, as long as we retain our rights, to distribute our work in whatever ways lead to maximum access, and we can manage our copyrights for that purpose. With improved discovery, as O’Leary’s research suggests, comes greater impact, and that should put a “gleeful” smile on the faces of scholarly authors.

# Hospitals in a Plague and the Unkindest Cut

*Mon, 21 Jun 2010 15:47:42, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain]*

By Will Cross

If you follow libraries and scholarly communications you've probably seen this phrase pop up online recently: "cutting libraries in a recession is like cutting hospitals in a plague." Eleanor Crumleholme's [pithy tweet](#) has gone viral and launched a minor [publicity campaign that is making the rounds](#) online and in libraries. The comparison is timely, of course, because libraries across the nation are experiencing historical cuts in funding, or even being closed down due to the [harsh economic conditions](#).

It has also caught on because it expresses a central truth: in times of economic crisis the library takes on an increasingly vital role supporting individuals and society. Libraries always serve as what Andrew Carnegie called the "cradle of democracy" by providing free access to information and entertainment as well as social spaces for public groups to gather, discuss ideas, and plan activities. Libraries also serve as the front lines of support for job-seekers by offering resources for job-hunting and instruction on technical skills and professional development. All of these needs are felt especially deeply in bad economic times.

Beyond their role as "the people's university" libraries also play a second-level role in bad economic times as drivers of innovation as recently discussed in a [series of articles in Harvard magazine](#). By storing, cataloging and providing access, and help with searching, libraries enable the innovations in research and technology that drive the economy. In this sense cutting libraries could also be seen as akin to cutting laboratories seeking a cure to the plague.

Most interesting to me, however, is the way that libraries themselves are reacting to the pressures of the current economic crisis by reexamining their own policies in light of changed circumstances. This can be seen starkly in the University of California system where two major cases have arisen that may alter the existing landscape of copyright and licensing in higher education.

The first is the well-publicized decision by UCLA to [continue to stream videos despite threats from content owners](#). The second is the UC system's decision this week to [boycott the publisher Nature's journals in response to a proposed 400% increase in subscription costs](#), a move that UC professors so far seem to be [supporting](#). In each case these institutions rejected prevailing norms of copyright and licensing, based at least in part on the significant financial cost the established system would have placed on a [state budget that is already in crisis](#).

One of the greatest impediments to changing scholarly communication practices is the inherent conservatism and risk-averse nature of large institutions. Where the law is unclear or a journal is extremely popular libraries often feel they have no choice but to grit their teeth and pay fees that are unreasonable or may not be required by the law. But tough economic times may change the calculus, pushing libraries towards new practices that might otherwise have seemed too risky.

Particularly when budgets are already stretched thin and [universities are pressured by the government to use student fees to subsidize content-owners](#) more libraries may follow the UC system in reopening the discussion about what fees are reasonable and how aggressively to exercise their rights as nonprofit, educational institutions protected by specific exceptions in the copyright law.

Following up on Kevin's discussion of "opportunity" in last week's post, it appears that these economic pressures may create a different sort of opportunity for libraries to escape economic systems and legal assumptions that limit their ability to lift up the disadvantaged and drive innovation. As in Shakespeare's Julius Caesar, this "unkindest cut" may upset the system but may also liberate us from a system that is already overreaching its proper powers.

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# Google books, orphan works and academic values

*Tue, 06 Jul 2010 07:15:21, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

I have long been impressed by the well-reasoned and articulate way in which Pamela Samuelson expresses her opposition to the Google Books Settlement. In the current issue of “Against the Grain,” a newsletter-style publication for librarians, publishers and vendors, Samuelson’s is, to my mind, the most persuasive of six short essays discussing the settlement. Unfortunately, there is no link available, since the current issue of “Against the Grain” is only available online for subscribers (which strikes me as pretty ironic). Nevertheless, lots of Samuelson’s writing on the settlement can be found [linked to this page](#).

I want to make two points about her ATG essay.

First, I was struck by her remarks about the relationship between the GBS and potential solutions to the orphan works problem. Google, and at least one of the other ATG essayists, tout the settlement as an incentive for Congress to solve the persistent problem of making orphan works more usable. But as Samuelson points out, the Google settlement approach really harkens back to a solution for orphan works — the creation of an escrow account to compensate owners who appear after the use in question has already been undertaken — that was considered and rejected some while ago.

The Library of Congress considered such an escrow model when it recommended an orphan works solution to Congress and decided against it. One obvious reason is that it establishes a financial barrier to using orphan works; such a barrier might reduce the problem of a “chilling effect” on such usage based on fear of litigation, but it would establish a new hurdle. Congressional proposals have instead followed the Library of Congress’ recommendation and focused, much more sensibly, in my opinion, on liability rules.

That Google thinks that an escrow model might pave the way for a full-blown orphan works solution suggests how completely in the thrall of commercial publishers they became once they abandoned the idea of defending fair use in court. They now have no place to go but toward subservience.

The second point I want to make based on Samuelson’s piece builds on her complaint that her objections to the settlement should not be addressed piecemeal, as Google has tried to do, but should be seen as reflecting a fundamental conflict between the GBS and the “cultural ecology of knowledge in academic communities.” I think she is right, and I particularly like her characterization of the system we tend to call scholarly communications. That system embodies a unique set of practices, values and incentives that are quite different from those ensconced in our traditional publication system. Indeed, the academic ecosystem is ill-served by an emphasis on the commercial value of knowledge and the subsequent drive to enforce an artificial scarcity on that knowledge. As Samuelson says, the academic ecosystem will be impaired by the Google settlement much more than it will be aided by the commercialization of out-of-print works.

I want to carry this point about an ecosystem a little further, and tie it to a theme I have [written about before](#). Once we recognize a unique academic culture and business model for knowledge, that recognition should be carried over into the analysis of fair use in the academic environment. The

second fair use factor, about the nature of the original work, is the obvious place to recognize why copyright works so poorly for academics, even if we concede that it still functions acceptably for Britney Spears. The Google settlement is clearly too sweeping and inclusive for this point to have a significant impact on it's construction, although Samuelson is persuasive in arguing that it shows that the classes in this class action lawsuit are not truly representative. But in situations where mostly academic works are at issue, like in the lawsuit against Georgia State University, courts should use the second fair use factor to explore the prevailing knowledge ecosystem in a comprehensive way. Such an examination of the scholarly communications system would result, inevitably, in a broader scope for fair use of academic works than might be available for works that are born and live out their useful lives (and then some!) in a commercial environment.



# Managing discontinuities

*Mon, 12 Jul 2010 07:41:03, ksmithl2@duke.edu, [category: scholarly-publishing]*

I spent a healthy portion of the long Independence Day weekend reading and chewing over a long blog post by David Rosenthal, who is a computer scientist involved with the LOCKSS digital preservation project. The [post was originally his keynote address at last month's Joint Conference on Digital Libraries](#), and it is packed with complex and thought-provoking analysis of the scholarly communications system.

It is very difficult to summarize Rosenthal's arguments, but he basically explains why all three of the major players in the current scholarly communications system — publishers, libraries and archives — are caught in unsustainable business models. His analysis of the problems with publishing are fairly familiar, while his discussion of preservation and archiving was new and startling to me. His discussion of libraries is his most cursory and the least compelling of his arguments for discontinuity. Rosenthal follows his argument about these three discontinuities with a further discussion, that was largely over my head, about the technological discontinuity that may accompany these economic disruptions and create a perfect storm of opportunity.

In the course of his description of academic publishing, Rosenthal includes a fascinating discussion of how scholarship is changing, moving away from producing static content and toward dynamic services, where data, analysis and Web tools are combined and overlaid to create interactive and dynamic knowledge tools. Here is Rosenthal's analysis of this disruption:

What scholars are going to want to publish are dynamic services, not static content, whether it be papers or data. The entire communication model we have is based on the idea that what is being communicated is static. That is the assumption behind features of the current system including copyright, peer review, archiving and many others.

Certainly from the perspective of copyright this is clearly a true statement; our legal system is struggling and largely failing to deal with overlays, mashups and other new products of the computer-assisted intellect. As such dynamic creations proliferate, it is clear that the disruption to traditional publishing, dependent as it is on a static scholarly record and the legal monopoly over that record bestowed by copyright, will also be great.

Rosenthal's point about scholarship, it should be noted, is true both in the sciences and in the humanities. The shift toward dynamic knowledge production has moved more quickly in the sciences, but visualizations, digital text projects and GIS enhanced research are moving the humanities and social sciences in the same direction. Traditional publishing is already beginning to fail to capture important parts of the scholarly record.

Which brings me to the disruption in peer-review, which Rosenthal mentions in the quotation above but does not elaborate upon. These new kinds of dynamic scholarly productions will clearly force a change in peer-review. As more kinds of scholarship that cannot be published in traditional journals are produced, and more scholarly attention is focused on these productions, colleges and universities will have to find new ways to evaluate the quality of these works. We will no longer be able to rely on the reputation of a particular journal title or publisher imprint as a surrogate for quality, since these productions will not be associated with publishing houses.

A new system of peer-review is long overdue in any case. Dissatisfaction with the current system is ubiquitous, and the expenses claimed by commercial publishers for managing the system, which is based on volunteerism after all, are absurd. But these issues will not be the engines of change; digital knowledge production, which the current system simply cannot handle, will be. A new system, distributed using the same network technologies as the productions it evaluates, will gradually replace the outsourcing of quality judgments to commercial firms simply because it must.

There has been some attention recently to claims that the promotion and tenure process keeps scholars loyal to traditional modes of publication. Such claims must be seen to be based on a very unstable foundation, because the same scholars who are surveyed to reach such conclusions are also the ones experimenting with new modes of teaching, research and scholarship. It is these scholars, not libraries and their budgetary worries, that are driving the changes that should really worry those who make their livings from the traditional publishing system.

# When is the price right?

*Fri, 16 Jul 2010 03:37:45, ksmithl2@duke.edu, [category: scholarly-publishing, category: technologies]*

It is always interesting when the events of my life and the materials I am reading coincide to force my attention on a particular point. Fate, I wonder? Providence? Maybe just coincidence.

Anyway, yesterday a colleague sent a message to an e-mail list in which he recommended a specific journal article in the library science literature. I was interested and set out to obtain a copy. In this particular case, however, Duke's impressive collection of electronic resources did not go quite far enough. Probably because we do not have an LIS school, the specific journal in question was canceled in print several years ago, and there is no electronic database in our collection that offers full-text access.

In the course of searching, however, I did discover that I could purchase a PDF of the single article directly from the journal publisher for a cost of \$30.00. That price point, I must say, exceeded my felt need to read the article immediately, and I opted instead for inter-library loan.

This mundane little incident occurred while I had [this article on "The iPad for Academics"](#) (from the "Chronicle of Higher Education") open on my desktop in anticipation of a closer reading. I have become an enthusiastic iPad user over the past two months, and this article confirms my own sense that one of the best functions of the device for academics is the ability to store, organize and comfortably read PDF journal articles.

In his editorial, however, Alex Golub goes beyond simply explaining the benefits and drawbacks of the iPad for academic use; he also comments on the changes he anticipates in scholarly publishing. He is funny and scathing about our current model for purchasing journal content — "[publishers] have pursued business models of the 'purchase this enormous bundle of journals you don't want or else our Death Star will destroy another planet of your Rebel Alliance' variety" — and he predicts that this soon may change. Golub anticipates that the iPad and the model of the apps store will lead eventually to the "retailization" of academic content. He speculates on the benefits if academic journals marketed their content directly to their ultimate consumers:

"What if you could log on to your ScienceDirect or JSTOR app and get a complete browsable list of your favorite journal articles, available for purchase for, say, 25 cents each?"

Golub asserts that "academics are ready for this development," but I have to wonder if publishers are there yet. Certainly there is a huge gap between the 25 cent price point that Golub suggests and the \$30 one that I encountered. For the disaggregated purchase model that Golub is advocating to work, some middle ground would have to be found, but I imagine that a successful price point would need to be much closer to the low end of the spectrum than to the current norm.

The truth is, I suspect, that the publishers really do not expect, or even want, to sell many articles at \$30 apiece. That price is meant to discourage, not to sell; it is intended to shock academics into insisting that their libraries subscribe, not only to the individual title, but to the electronic bundle in which it is packaged. The publishing industry is built on large payments for aggregated content and shows little inclination to transition to any form of disaggregation or micro-payments. Indeed, if we could make this transition, the intermediary role of the publisher might begin to seem even less important than it does now.

In fact, I am not entirely convinced that the academy is really ready for some of the changes that disaggregation would usher in. One consequence might be the disappearance of quite a few smaller journals. Bundling keeps many journals with only niche markets in business. Disaggregation would allow such journals to take advantage of “the long tail” that Internet marketing clearly supports, but it is not at all certain that all of those small, niche journals could exploit “long tail” marketing or survive on it. Who would win and who would lose in that situation is an open question, but it is certain that there would be fairly dramatic changes in how academic content is registered, evaluated and disseminated.

I don’t want to sound like I am opposed to the idea Golub suggests for “apps based” sales of scholarly articles; it is an intriguing idea. It might well be a better alternative for the majority of scholars than our current clunky and inefficient system. But we should not underestimate the disruption to settled practices that significant change in the scholarly communications system will involve. As librarians and others advocate for those changes, we need to remain aware of the potential for such disruptions, and sensitive to the varying reactions we are likely to hear from the scholars we serve.

# More protection for military faculty, or less?

*Tue, 20 Jul 2010 09:58:34, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain, category: scholarly-publishing]*

Section 105 of the U.S. Copyright Law tells us that there can be no copyright in works of the federal government. Almost uniquely among the nations of the world, the US government does not get to exclude others (including taxpayers) from using works created by government employees as part of their employment. There are numerous studies about the benefits of this lack of protection; one of the most interesting are [these comments by Professor James Boyle in his book \*The Public Domain\*](#) about weather data gathered by the US government. As Boyle points out, the social value of this freely-available data is much greater than any value that might be gained through copyright protection.

One group whose exclusion from copyright protection might strike us as unfair, however, is the faculty of the military academies (West Point, Annapolis, etc.) and government run War Colleges. While their colleagues at other institutions hold copyright in their scholarly works (unless an institution claims work made for hire), scholars at these schools do not. When I first read about a [new bill in Congress, H.R. 5704](#), I innocently believed that it was an attempt to remedy that disparity, and my initial reaction was ambivalence.

I say ambivalence because my distress that material would be removed from the public domain by this legislation was balanced by a concern for fair treatment of this group of academics. Our public domain in the US has been seriously cramped and diminished by copyright legislation over the past twenty years, and removing works that are supported by taxpayers from the realm of public accessibility just doesn't seem right. But neither does it seem right that this one group of scholars be treated differently than other university faculty members. So I was prepared to read the legislation with an open mind.

My mood turned from ambivalence to horror when I read the legislation. Inside the Trojan horse of faculty rights is hidden yet another grab for more rights and more profits by the publishing industry. Not only will this bill not benefit military faculty members, it will put them in a far worse position than other academic authors.

The problem with this bill, as with much legislation, is in the fine print. What seems like a marginal idea when you read the title of the bill is revealed as really lousy when you dig into the text. Here, the language of the legislation says that faculty at the covered institutions can secure copyright protection “only for the purpose of publication by a scholarly press or journal for which such a copyright is normally a requirement.” And then it adds the kicker — “Upon acceptance for publication of a work for which copyright protection exists by reason of subsection (a), the person holding the copyright shall transfer the copyright to the owner or publisher of the medium in which the work will be published.”

This bill is not about protecting military academy faculty. It is about allowing publishers to garner yet more profits off of work supported by US taxpayers. And it really mistreats the academic authors by requiring them to transfer copyright to publishers; the word “shall” in the sentence quoted above makes the transfer mandatory rather than voluntary. If the point had merely been to give faculty authors the same flexibility enjoyed by other scholarly authors, the word “may” would have been used. But the publishers who clearly drafted this bill don't want to have to negotiate with these authors; they want a legal mandate to give them rights at the expense of taxpayers and the public domain.

Scholarly authors are free to negotiate the terms of publication. They do not have to transfer copyright, or they can make that transfer contingent on the retention of certain rights. In fact, the retention of various kinds of rights is extremely common today. But if this bill were passed, military faculty would not have that option; they would get copyright *only* for the purpose of publication and they would be *required* to transfer that copyright. No negotiation, no compensation or *quid pro quo*, just a windfall for publishers.

As this [blog post about H.R. 5704](#) points out, this bill attempts to solve a problem that does not exist. Publishers have known for 200 years that there is no copyright in government work. Most publication agreements account for this by allowing authors to indicate that they are government employees and therefore have no copyright to transfer. But this bill, with its forced transfer of rights, would give the publishers a little more leverage over scholarship by giving them, and only them, copyright control over works previously in the public domain. It would not benefit the public or the authors of the work. The latter, indeed, would be compelled to work for publishers for free while being paid by taxpayers; they would be in a slightly worse position vis-a-vis publishers than are all other scholarly authors.

Apparently an earlier version of this bill — which for the sake of honesty should be titled “a tax on the public and on military faculty for the benefit of private publishing firms” — died in committee a few years ago. Let’s hope for a similar fate this time around.

# Due process for file-sharers?

*Fri, 23 Jul 2010 07:59:09, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

It is fascinating to see the different reactions to the decision by District Court Judge Nancy Gertner to reduce the damages assessed against Joel Tenenbaum for sharing unauthorized digital files of music from \$675,000 (or \$22,500 per song) to \$67,500 (or 2,250 per song). There is a relatively impartial description of the issue [here on the Law Librarian blog](#), but other reactions have been all over the map. Some have decried the ruling as a “lose/lose situations” because Tenenbaum has said that he still cannot pay the judgment and the RIAA has announced that it will not accept the revised judgment either. On the CNET blog the decision was called [“A copyright ruling that no one can like.”](#) The Electronic Frontier Foundation, however, does like the decision, [congratulating Judge Gertner](#) for helping to “restore sanity” to copyright damages.

These reactions beg for a close reading of [the decision](#) in order to judge for oneself if it is a disaster for copyright law or a victory over the Evil Empire, and I postponed my own comments until I had had the opportunity to make such a reading. My reaction was more muted, not to say boring, than those I had read. I have no desire to defend large-scale sharing of music or movie files without authorization, and I fear that more legitimate uses of the fair use defense will be undermined if it is raised too often in these cases. But I am glad to see the issue of whether statutory damages in a copyright case are susceptible to due process limitations teed up for appeal as cogently as Judge Gertner has done.

In her ruling, Judge Gertner explicitly states that she did not take the same legal route as was taken to reduce the damages in the other high profile file-sharing case, the equitable doctrine of [remittur](#). Had she taken that course, there is little doubt that the RIAA would request a new trial and the same issues would be rehashed again. Instead, by ruling that the award was an unconstitutional violation of the Fifth Amendment right to due process, Gertner has forced the RIAA to appeal to a higher court, where the Constitutional issue will be squarely faced.

It is well established that punitive damages — those designed to punish and deter a defendant, and others, from repeating the actions for which they were found liable, are subject to checks imposed by the promise of due process. Basically, a defendant cannot be held liable for amounts of money that are wildly out-of-line with the harm they caused. Four million dollars for failing to disclose that a “new” car had actually been repainted is the classic example (from the *BMW* case the Judge discusses at length). The question has been whether this analysis can be applied even in situations, like copyright, where a range of statutory damages is specified in the law and serve to cabin in the discretion of juries, who tend to get emotional when awarding punitive damages.

Judge Gertner has held that the due process concerns outlined in *BMW* and other cases do apply to copyright, even though there is a statutorily-mandated range for damages. She distinguishes the procedural issue — does the defendant have reasonable notice of how much his behavior may cost him — from the substantive issue of fairness. Even though the procedural due process issue is off the table in a statutory damages situation, the Judge holds that substantive due process concerns can still provide Constitutional grounds for reducing an award that is within the mandated range in specific circumstances.

One of the most interesting aspects of her decision is Judge Gertner’s exploration of the legislative history of the statutory damages provision. In both comments and actions taken by Senators Orrin

Hatch and Patrick Leahy, who sponsored legislation in 2000 to increase the range of statutory damages for copyright infringement, the Judge finds evidence that they never imagined private individuals engaged in non-commercial conduct would be subject to the heaviest weight of the damages. At one point Judge Gertner writes:

Since the jury's award in this case fell within the range set forth in section 504(c), there is identity between the damages authorized by Congress and the jury's award. Nevertheless, it is far from clear that Congress contemplated that a damages award as extraordinarily high as the one assessed in this case would ever be imposed on an ordinary individual engaged in file-sharing without financial gain. Just because the jury's award fell within the broad range of damages that Congress set for *all* copyright cases does not mean that members of Congress who approved the language of section 504(c) intended to sanction the eye-popping award imposed *in this case*.

There is even a remarkable passage in the ruling where the Judge recounts an incident that occurred during a hearing on the bill to raise the statutory damages ceiling in which Senator Leahy himself announced he was downloading a song as he spoke, and dismissed concerns that he could be subject to the very damages he was proposing.

Judge Gertner's ruling is clear and well-reasoned. I confess that I find her argument compelling, since the extraordinary scope of statutory damages in copyright has a chilling effect on non-commercial and even educational uses. More clarity on when the highest level of damages should, or should not, be in play is badly needed. I cannot say for sure that the Judge got this right, but she has provided a solid record for review and an excellent basis upon which the higher courts can consider this important issue.



# The new, improved DMCA

*Mon, 26 Jul 2010 13:23:14, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: digital-rights-management, category: fair-use, category: technologies]*

Last week I wrote, but had not yet posted, a comment about the proposed copyright reform in Brazil and the more nuanced approach they took to anti-circumvention rules that protect technological systems intended to prevent unauthorized access. In the course of that discussion I again criticized the Library of Congress' long delay in announcing new classes of exceptions to the US anti-circumvention provisions. I expressed the hope that, after waiting so long, they would at least get it right.

They did.

Before I had a chance to publish my post, [the new exceptions were released](#), albeit eight months late. Also, an important appellate court opinion about the DMCA anti-circumvention rules was handed down. So now I have three points to make about the DMCA and anti-circumvention rather than just one, and taken together they constitute my first ever optimistic writing about this subject.

First, the new DMCA exceptions announced today by the Library of Congress include the broader exception for higher education that many of us asked for during the rule-making proceedings. Indeed, the language is broader than I dared hope, apparently allowing circumvention of DVDs for a broad array of purposes in higher education. Certainly all professors can now circumvent for the purpose of compiling clips for teaching, as well as for incorporating clips into larger scholarly works. Documentary film-making and non-commercial videos seem also to be able to circumvent for purposes of criticism and comment using short portions of a protected film. Indeed, this exception comes close to allowing circumvention (of one type of media) for most fair uses, although it does not quite get us to that point.

The new exceptions also include a provision to allow circumvention of e-book technological protections when necessary to enable a read aloud or screen reader functions. This exception also addresses a problem that higher education has long felt when accommodating students with a visual disability.

Second, this [case out of the Fifth Circuit](#), involving software used to control "uninterruptable power supply" (UPS) machines, made a very clear statement that the DMCA's protection of DRM systems "prohibit only forms of access that would violate or impinge on the protections that the Copyright Act otherwise affords copyright owners.... Without showing a link between "access" and "protection" of copyrighted work, the DMCA anti-circumvention provision does not apply." The Court quotes another circuit for the proposition that the DMCA creates no additional rights other than what the copyright law already grants; it merely provides for a different form of protecting those rights. With this language we seem to move even further down the path toward saying that anti-circumvention is not prohibited when the purpose for which access is sought would be a fair use.

Which gets me to my third point, about the proposed copyright reform in Brazil. As I said in my earlier post:

"Brazil offers an international example of how to handle anti-circumvention the right way from the start, instead of creating a draconian rule and then forcing law-abiding users to beg for limited exceptions. Brazil has introduced a balanced approach to anti-circumvention as part of its copyright reform proposal ([available here, in Portuguese](#); see especially section 107). As Canadian copyright law [professor Michael Geist explains](#)

[on his blog](#), this proposed reform imposes penalties for circumvention of legitimate technological controls on access, just as US law does. But it also specifies that circumvention of such controls is permitted for access to public domain materials and for purposes that fall under Brazil's 'fair dealing' exceptions; an obvious limitation that US law ignores. What is more, the Brazilian proposal would impose penalties equivalent to those for unauthorized circumvention on those who would hinder circumvention for these legitimate purposes."

Now, of course, we are much closer to the same kind of sensible approach than we were just a few days ago. It is interesting to note that I mentioned in that earlier, never-published post, that the US Trade Representative would be upset at Brazil for not incorporating US-style DMCA rules. But I have just seen this news about how the [USTR is backing down](#) about harsh anti-circumvention provisions even in ACTA, the Anti-Counterfeiting Trade Agreement I have [talked about before](#). I believe I may hear the turning of a tide.

# Reading the fine print

Tue, 27 Jul 2010 12:27:09, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: digital-rights-management, category: technologies]

Yesterday's announcement that the Library of Congress was designating new classes of works exempt from the anti-circumvention rules of the DMCA has generated lots of Internet buzz, especially about the exemption for those who "jailbreak" their cellular phones. The major exemption for higher education, allowing circumvention by faculty for a range of defined educational purposes, has also gotten some press, some of it excellent and some of dubious accuracy. In the latter category, unfortunately, is [this piece from Inside Higher Education](#), which I will discuss below.

But first let's look at the actual language of the exemption. What follows is based on the detailed [description of the six exemptions given in today's Federal Register](#).

First, the exemption is to permit circumvention of technological protection measures — the breaking of digital locks — for certain classes of works and for defined purposes. These rules do not change the definition of fair use; they merely specify a small group of purposes within the broader category of fair use for which circumvention is permitted.

Next, this exemption applies to *lawfully made and acquired DVDs that are protected by Content Scrambling System (CSS)*. This application is both broader and narrower than the previous rule. It does not require that the DVD be part of a university's library collection, much less the collection of a film or media studies library. The DVD can come from anywhere as long as it is not pirated or stolen. But it applies only to DVDs that use CSS; it does not, for example, apply to Blu-Ray discs. So a faculty member can make a compilation of clips from her own DVD library, for example, unless she collects that library in some format other than traditional DVD.

The exemption applies to three specific activities for which circumvention is necessary.

First, it applies to educational uses *by college and university faculty and by college and university students of film and media studies*. Notice that the category of faculty is all inclusive, but the category of students is limited. The Library of Congress determined that not all students needed this exemption; presumably they were also aware of industry fears that students would carry the permission too far if the exemption were general. Also, the application to educational uses does not include K-12 teachers, who were also determined not to need the ability to obtain high-quality clips. Presumably they are still expected to point a digital camera at a TV screen if they want a clip from a motion picture.

The other activities to which the exemption applies are documentary film-making and non-commercial videos. Presumably some of the limitations to the persons allowed to circumvent for educational purposes may be mitigated by these two defined activities. A university student who is not studying film and media studies, for example, might still want to use a film clip in a class video project and could be permitted because it is a non-commercial video.

So once we are clear about what can be used, by whom and for what purposes, it remains to ask what exactly we can now do. The answer is that we can circumvent technological protection measures in order to *incorporate short portions of motion pictures into new works for the purpose of criticism and comment*. Several phrases here call for explication. First, circumvention is allowed for copying short portions, not entire films. Second, this exemption applies only to motion pictures, not to other content,

like video games, that may be available on DVD. Third, the clip must be used to create a new work. I was glad to see that the explanation of this phrase in the Federal Register is explicit that “new work” does include a compilation of film clips for teaching, as well as other videos in which a short clip may be subjected to criticism and comment. Finally, that purpose of criticism and comment is a required aspect of the defined activity that is permitted.

The last requirement for this exemption is a *reasonable belief that circumvention is necessary to accomplish the permitted purpose*. The announcement is very clear that if another method of obtaining the clip without circumvention is available and will yield a satisfactory result it should be used.

This seems like a lot of requirements, but I think that overall we have a pretty useful exemption here and one the application of which will not really be too difficult. Once we understand the four italicized phrases above, it seems that we should be able to recognize permitted instances of circumvention when we see them. Certainly this is easier to understand and apply than the exemption it replaced. But when we look back at that item from Inside Higher Ed, it is easy to see how excessive enthusiasm can still lead to misunderstanding.

For one thing, the IHE piece does not acknowledge the limitation placed on students who can take advantage of this educational purpose exemption. It may be, as I suggest above, that that limitation will be swallowed by the other permissions, but we should at least recognize the intent behind the rule. More importantly, this exemption to the DMCA’s anti-circumvention rules really has nothing to do with the dispute between UCLA and AIME or with other projects to stream entire digital videos for teaching, in spite of what IHE suggests. While such projects may or may not be justifiable, this exemption does nothing at all to change or define the boundaries of fair use; it merely carves out a portion of those uses, which the Registrar calls “classic fair use,” for which circumvention is now permitted. There may be other uses that are fair, but this exemption neither determines that question nor authorizes circumvention for those purposes.

It is what it is, and no more, but what it is good news for higher education.

# Clearing up some confusions

*Fri, 30 Jul 2010 10:00:42, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

The press of daily business yesterday made it harder than I expected to watch and listen to the entirety of the House [Committee on Oversight and Governmental Reform's](#) hearing on the Federal Research Public Access Act. Documents from the witnesses can be found [here, on the page for the Committee's Minority members](#). Perhaps unfortunately, most of what I heard was from the panel of folks opposed to the legislation. From that group there were several pretty egregious comments about the state of scholarly research and publishing, and it seems like clearing up some of the misapprehensions might be worthwhile. There is lots to choose from, but I will focus on three seriously misguided claims.

First, I was truly shocked to hear the official from the American Psychological Association let stand the assumption, made by a committee member, that part of the value added to a published article was the clearing of rights in any third-party owned material that is incorporated in that article. When the Congresswoman asked if that was part of the service that publishers provided, and opined that it was a significant contribution that would be a burden for individual authors, Mr. Beckler agreed with her and went on in general terms about all the value publishers add. Except, of course, publishers do not do this; authors do, and it *is* a burden. Indeed, virtually all scholarly publishers require that authors warrant, in their publication agreements, that they have received permission from any owners for incorporated content. This is as true of APA as it is of other publishers. [Here is the APA's publication rights transfer document](#); in the paragraph above the signature, item (b) is the author's affirmation "that written permission has been obtained for all previously published and/or copyrighted material contained in this manuscript." So the claim that this is value added by publishers is, like so many such claims, really just free-riding on the labor of scholarly authors.

A similar kind of claim was the one made by all of the panelists in this group that publishers add copyrightable content to the scholarly articles they publish. This was again in response to a question about editing and peer-review and it led all three to affirm that publishers make a contribution that is entitled to copyright protection independent of the copyright which they get from the authors via forced transfer. I have published several peer-reviewed and edited scholarly articles in my career, and every word of those articles was my own. Editors sometimes suggested changes (more often peer-reviewers did), but I created the protectable expression that incorporated those changes. Even copy editors usually obtain the author's permission for changes beyond correcting a typo. I continue to be amazed and confused by the claim that there is some protectable contribution made by publishers, and I suspect that if there really were such a contribution it would be to the detriment of the scholarly record, since no publisher is as expert on the topic at hand, whatever it is, as the authors are.

In this [report from the Chronicle of Higher Education](#), this claim about protectable contributions is repeated in the form of AAP attorney Allen Adler's assertion that published articles are "partly the product of publisher's labor." There are two basic copyright principles that need to be asserted to understand why whatever work publishers put in on an article does not translate to copyright protection. First, copyright protects expression, not ideas. Whatever suggestions for revision come from publishers — and most of them come from independent, volunteer peer-reviewers — those suggestions do not translate into a copyright claim. Only expression, which is, or should be, the work of the authors, is entitled to copyright. Second, the Supreme Court has reminded us that no copyright can be earned simply for "sweat of the brow." No amount of labor on an article earns a copyright interest unless it results in original expression, which the labor of publishers almost never does.

Finally, there was the odd little speech given by one of the Committee members about how important it was that we do not allow foreign governments and companies to “steal our intellectual property.” When I heard this I want to shout that the Member did not understand the bill they were considering. FRPAA applies to published research which is already available for sale through various subscriptions and database. Foreign companies can already get their hands our “our” IP if they are willing to pay the prices for subscriptions or individual article downloads. Presumably Chinese companies, for example, that want to compete with the US are willing to pay the sky-high prices charged by STM publishers; it is the cost of doing business for them, and the publishers are happy to take their money. What FRPAA would remedy is the lack of access for smaller US companies and less wealthy educational institutions, as well as individual patients and others who need or are interested in the latest scientific research. Understood properly, FRPAA is not so much a threat to US competitiveness as it is a necessary step to maintain that competitiveness. As Sir Richard Roberts said in his remarks, if high school students, community colleges students, students at small colleges and researchers at smaller labs and companies can all get access to cutting edge scholarship, US research and development will accelerate. If they cannot, our economic future does not look good.

# Dueling Myths

*Wed, 04 Aug 2010 12:15:38, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use]*

It is a curious coincidence that in the past few weeks I have become aware of two different — very different indeed — documents which purport to refute common copyright myths. The differences are easily understandable, given the two sources of the respective documents, and each reflects, to some degree, the prejudices natural to its authorship. It is, I hope, an interesting exercise to look at them side-by-side and see if and where each goes astray.

For an odd mixture of dead-on accuracy and exaggeration in one's own economic interest, it is hard to beat this list of [Ten Common Copyright Myths](#) from the UK Copyright Service. The Copyright Service is a collective registration services that clearly depends for its income on putting copyright holders in fear of infringement and significant financial losses; this is evidenced by their use of the frequently discredited figures regarding the alleged cost of IP "piracy" worldwide. The Copyright Service makes money when rights holders are convinced that they need the extra layer of protection that registration with the service (a private equivalent of the registration available in the US from the Library of Congress's Copyright Office) provides.

The accurate part of the Copyright Service's list of myths is the first half; myths 1-5 are accurate and correctly described. They represent misunderstandings that are frequently heard, although the myth about "poor man's copyright" is probably not so common as to deserve being treated as copyright myth number 3, but it is a direct threat to the Service's own business model.

Where things go wrong with this document is in myths 6 through 9. The statement of each myth does, in fact, recite an inaccurate statement, but the debunking of these myths really overstates the scope of protection and the need for permission. Indeed, the claim that one should just always seek permission simply because it is not true that using 10% is always fair use merely substitutes one myth for another. Fair use and fair dealing are necessary and inescapable; ordinary citizens could not go through their days without committing infringement were it not for these provisions. They cannot be simply dismissed as unreliable, especially because the transaction costs of "always" seeking permission would be prohibitive and would swamp an organization like the UK Copyright Service.

In addition to this re-mythologizing that occurs in myth 7, myths 8 & 9 represent an exaggeration of the risk involved in using copyright material in some cases. Myth 9, attempting to assert how easy it is to prove copyright infringement, completely ignores the existence of numerous defenses available to users. Such defenses are an indispensable part of the copyright law in the US and the UK; they preserve the balance of the law and protect important social values like creativity and free speech.

On the other side of the scales is this article on [Urban Copyright Legends](#) from Brandon Butler of the Association of Research Libraries. Butler's approach is obviously more from the side of users than of rights holders, and the difference of perspective makes reading the two similarly titled documents an interesting experience. Most importantly, Butler offers a much more balanced and realistic perspective on fair use than does the Copyright Service.

In his discussion of "fair use legends" Butler does a nice job of presenting fair use as what it really is, a framework for a responsible analysis of risk in any given situation. Fair use is never a certainty, but it is not a total crap-shoot either. Butler shows that the burden of proving fair use is a relative matter; in

some situations, especially non-profit educational settings, it is a relatively easy and secure analysis that we can and do rely on everyday. In other cases the risk may be greater, and the value of the activity must be weight against the cost of permission and the potential cost of litigation. This is a calculation that every librarian and academic actually does all the time, and more familiarity with how it works is a major value to be gained from Butler's article.

In the second part of his article, on legends associated with the performance exceptions in section 110 of the Copyright Act, Butler is on somewhat less secure ground. His debunking of urban legends relies here on some distinctions that are not as well-established as we might like. Relying on legislative history, for example, is always a tricky business. That there has not been major litigation over the TEACH Act, for example, is a good thing, but it leaves us rather more uncertain about just where the lines can be drawn than Butler suggests. Likewise, the line between those videos that are "primarily marketed for educational use" and those that are available for use under 110 is not really very clear and has never been subject to judicial interpretation. Nevertheless, the examples Butler offers do support his point that over-interpreting this language can lead to needless self-restriction well beyond what even our over protective copyright law requires.



# Hot news, cold idea

Mon, 09 Aug 2010 10:56:34, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: public-domain, category: technologies]

At a meeting about public access to federally-funded research that I attended earlier in the year, a publisher strenuously asserted that it was not the role of the government to drive a business out of the market. He was right of course, but so were a group of us who replied that neither was it the role of the government to prop up a business that otherwise could not survive.

I was reminded of this exchange when I looked at the [“Discussion Draft”](#) from the Federal Trade Commission on “support[ing] the reinvention of journalism.” Unfortunately, the policy recommendations floated in this document have very little to do with reinventing journalism, but a lot to do with propping up the traditional business model of newspapers. Most of the ideas put forward here, and they come not directly from the FTC but from those the FTC has discussed the issue with (a telling process of selection in itself), are about how to keep that status quo in news publishing from collapsing under its own weight and under the pressure created by new opportunities for disseminating news offered by the Internet. Rather than looking at how journalism must change, the FTC has offered a set of proposals for how to protect the current set of badly mismanaged news organizations from the Internet.

There are lots of critiques of these proposals, including ones found [here](#) and [here](#). My [favorite comment](#), from Kent Anderson of the “Scholarly Kitchen” blog, notes that the FTC does not “acknowledge how newspapers and other traditional media exploit free information tools like Facebook and Twitter to lazily learn about news through their desktops.” So, in the great tradition of “what’s mine is mine and what’s yours is also mine,” newspapers seek to prevent others from disseminating news on the Internet while wanting to benefit from that dissemination whenever it can save them money.

Google released an extensive, and deadly accurate, critique of the FTC proposals, which can be found [here](#).

What concerns me most about the FTC proposals and the ideas coming out of the news industry is that copyright law need to be revised to provide news organizations with additional protection. Sometimes they suggest that fair use should be amended to exclude the possibility of a fair use of news coverage. Worse, they often suggest, including to the FTC, a statutory version of the so-called “Hot News” doctrine.

The “Hot News” doctrine provided some protection for organizations that first reported a news event from those who would re-use the reportage, sometimes even exploiting technology to “scoop” the original reporters. What technology, specifically? The telegraph. You see, the hot news doctrine dates from a 1918 Supreme Court case and has had very little traction in the modern world. In that case, *International News Service v. Associated Press*, the Supreme Court upheld an injunction restraining INS from “appropriating news taken from [AP] bulletins... for the purpose of selling it to defendants clients.” In spite of a [recent attempt by AP to revive the doctrine](#), I want to suggest that there are at least four good reasons that “hot news” should have no place in copyright law.

First, we should recognize that the original decision by the Supreme Court was not a copyright ruling, but involved unfair trade practices. These state law protections apply only between business

competitors and would not prohibit non-profit distribution of the news by “citizen journalists” and those who post news stories to their Facebook sites. Incorporating hot news into copyright would have the potential to do just that, expanding the protection for news way beyond what the Supreme Court authorize almost a century ago.

Second, times have changed a lot since 1918. In the *INS v. AP* decision, the Supreme Court spilled a lot of ink discussing the economics of news gathering in order to justify the limited protection they were upholding. Those economics have changed so drastically, as Anderson’s comment illustrates, that the foundations of the hot news doctrine have really been undermined.

Third, further erosion of those foundations came from the Supreme Court in 1991, when the ruled, in *Feist Publications v. Rural Telephone Service*, that no copyright could be obtained merely through “sweat of the brow.” If the hot news doctrine were imported from unfair competition law into copyright, we would be importing a sweat of the brow doctrine that is at odds with the structure and underlying principles of the Copyright Act.

Finally, it is simply contrary to fundamental principles of democracy for the law to constrain ordinary citizens from talking to one another about the news of the day. News is a unique category of information because of its importance to a democratic society. While the opportunities to exchange information and ideas about the news that exist today can be used for good or for ill, it is not the place of the government to constrain those opportunities, even in the name of propping up newspapers’ foundering business models.

# Easy as 123?

*Mon, 16 Aug 2010 13:24:01, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

A colleague recently suggested that I consider why it was that two groups with putatively similar interests — the Association of American Universities (AAU) and the Association of Public and Land-grant Universities (APLU) — seemed to take different positions in regard to the Federal Research Public Access Act (S. 1373 and H.R. 5037), which was the subject of House committee hearings two weeks ago.

The difference seems rather slight at first. [David Schulenberger of APLU testified](#) at the hearings and supported the adoption of FRPAA. The AAU, on the other hand, [sent a letter to the Committee](#) that was holding the hearing, for inclusion in the hearing record, but never actually mentioned FRPAA. Instead the letter urges passage in the Senate of the [America COMPETES Reauthorization](#) bill, which has already passed the House as H.R. 5325. The letter, like Schulenberger's testimony, expresses support for rapid public access to federally-funded research, but it supports the "collaborative framework" that was agreed upon earlier in the year by the "[Scholarly Publishing Roundtable](#)" and which, according to the letter, would be fostered by section 123 of America COMPETES. So it is worthwhile to look at how the two bills differ.

The major difference is in immediacy of impact. FRPAA is a mandate which federal funding agencies would be required to implement. Section 123 of America COMPETES contains no such mandate; instead, it would create an "Inter-agency Public Access Committee" with a charge to "coordinate the development or designation of uniform standards" and "solicit input and recommendations" on "access to the results of federally funded research." Section 123 also includes precatory language about "the role that scientific publishers play in the peer review process." In this language I hear echoes of the [exaggerated claims](#) about the contribution from publishers that were made at the hearing itself.

I was interested to discover that other librarians seem also to read America COMPETES as something of a delaying tactic, or even as a rearguard effort to undermine public access initiatives already underway. In a [joint letter](#) from the Medical Library Association and the Association of Academic Health Sciences Libraries, those two organizations express pleasure at the language about public access included in section 123 but also some concern. Specifically they want a clause inserted that would prevent the proposed inter-agency committee from interfering with the current NIH Public Access Policy, which they see as a well-function model for public access, not a system in need of additional oversight. These two organizations also worry that the language about peer-review overstates the impact that public access has on that system. Whatever the flaws in peer review, and they are many, public access programs like that of the NIH or those proposed under FRPAA have no significant impact on the process; the MLA and AAHSL want to remind Congress of that fact.

My concern that support of Section 123 was a stalking horse to undercut FRPAA was strengthened a bit when I saw a recent report on IP activities from the AAU. In that report what seemed implicit was made explicit; AAU, through its Scholarly Publishing Roundtable, would support FRPAA only with changes that track America COMPETES in terms of the inter-agency coordination but also would include a longer embargo period (even longer than the 12 months specified in the NIH policy) and mandate "formal" consultation with "all stakeholders." This last change presumably means that funding agencies could not attach requirements to their grants without first talking to publishers (and by the way, is the taxpaying public considered a stakeholder here?). These stipulations leave me wondering to what degree AAU's support for America COMPETES is a subtle attempt to oppose FRPAA under the guise of endorsing its goals but seeking conditions that would undermine the path to achieving them.

# Reading tea leaves

*Wed, 18 Aug 2010 10:12:16, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use]*

In the ongoing copyright litigation between Georgia State University and Cambridge, Oxford and Sage publishers, we are at a stage where everyone is waiting for Judge Orinda Evans to rule on the cross motions for summary judgment. In the interim before her ruling, it is fascinating to look at the [orders she has issued](#) directing the parties to give her information. The orders may tell us a bit about what the Judge is thinking, although such divination is always fraught with uncertainty.

In her first such order, back in June, Judge Evans directed the parties to file with the court a complete and certified copy of the new Georgia State copyright policy. This development presumably indicated that the Judge was giving full consideration to the fair use argument and also that she was determined to stick to the analysis of the current policy. Those who purport to speak for the plaintiffs in the case sometimes seem to want to continue to make the case about practices at GSU prior to the adoption of the new policy, in spite of Judge Evans's previous rulings. This order in June indicates, I hope, that the Judge is keeping her eye on the ball.

Last week is when the orders got really interesting, in my opinion. First the Judge ordered the plaintiffs to provide her with a list of all of the items assigned for each class in the three 2009 semesters that are alleged to be infringing. Again, she seems determined to look only at practices that occurred after the new policy was adopted in February of 2008, and is looking carefully at what those practices really are. Whether or not this is a good thing for defendants or for plaintiffs, it speaks well of the determination of the Judge to keep the cases within the bounds she has set for it and not be swayed by outside rhetoric.

If we are looking for good news for the defendants in this case, however, I think it is to be found in the [next order, filed last Thursday](#). There the Judge orders the plaintiffs to provide her with a list of the retail cost of each work that was allegedly infringed during the 2009 semesters and the cost of licensing the excerpts that were used. It is my opinion that the deeper the Judge looks at the economics of scholarly publishing and university teaching the clearer the need for fair use in this context will be. To be fair, one could interpret this order a different way, and see it as the Judge evaluating the harm that has been done to publishers by Georgia State's alleged infringement. But this interpretation seems less likely when one looks at the actual language the Judge uses in her order. She clarifies what she wants by asking to be shown "what a student would have to pay to purchase the entire work." Regarding licensing fees, she puts the question in terms of "what each instructor would have to pay" and then adds a request for the cost per student of these fees.

My strong hope is that Judge Evans, in these orders, is evincing a desire to fully understand the potential costs of the ruling she is being asked by plaintiffs to make. Her decision has the potential to dramatically raise the cost of higher education for students and/or reduce the options available to instructors in the state. I hope that when she sees the high cost of books from these presses and realizes that [permission fees are pegged](#) to cost as much or more than retail sales, she will understand that the fundamental policy choice she must make is a trade-off between higher revenues for publishers and quality, accessible education for Georgians.

# Don't take my word for it

*Mon, 23 Aug 2010 10:32:19, ksmithl2@duke.edu, [category: notes]*

There are two things that persistently bother me about the musing I post to this blog. The first is very general — so often I sound like Chicken Little, crying that the sky is falling. Readers might well ask if things are really as bad as I make them sound in the copyright arena, although I spend enough of my time with frustrated, angry or frightened academics whose teaching and research is impeded by copyright restrictions to justify my dire warnings.

The second, much more specific, thing that bothers are the requests I get for “something short and simple I can read about copyright law.” Unfortunately, as the copyright law has grown more and more complex, full of new exceptions to try to mitigate the harms done by new monopoly rights and longer protection, a “short form” (and the analogy to the tax code is apt) simply is not available.

There are a couple of excellent websites, of course. The [Crash Course in Copyright](#) at the University of Texas and the [Copyright Advisory Office site](#) at Columbia are my favorites. But now I have the chance to recommend two short articles that I think really will help clarify the current copyright situation for interested readers.

To start literally at the beginning, this [short essay on “The Purpose of Copyright”](#) by law professor Lydia Pallas Loren takes us back to the beginnings of copyright to understand how and why it has wandered from its historic purpose (at least as expressed in the US Constitution). Professor Loren makes a persuasive case that copyright law needs to return to the “delicate equilibrium” that copyright laws seek to establish. Hers is an eloquent description of how copyright has gone wrong due to some pervasive misunderstandings and what the path to a restored balance would look like.

The situation specifically in academia is nicely summarized by another short paper, this one by Dorothea Salo on [“Who Owns Our Work?”](#) Through the prism of the thorny ownership questions that are arising around all kinds of academic work, Salo nicely outlines the conflicts inherent in the current system. Her essay is about a good deal more than ownership *per se*; it is a compelling summary of the issues that need to be resolved if scholarship is going to make the kind of progress in the digital age that the technology offers.

It is nice to be able to offer these two articles — both readable and compact — both because of their quality and because the next time someone asks me if things are really as bad as I suggest, I can point to Loren and Salo and respond, “Don’t just take my word for it...”

# What everybody knows

*Fri, 27 Aug 2010 07:43:05, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation]*

“Authors are only motivated to write if they know their rights will be protected.”

“No man but a blockhead ever wrote, except for money.”

The second of these quotes, from Boswell’s “Life of Samuel Johnson,” is very familiar, I think, and demonstrably false. Indeed, even Boswell acknowledged its falsity as he recorded it, and attributed the comment to Johnson’s “indolent disposition.” The first quote comes from [this fascinating article in the online version of the German magazine “Der Spiegel”](#) reporting research that suggests that German’s 19th century industrial expansion may have been at least partially driven by the **absence** of strong copyright protection.

That authors must have strong copyright protection in order to create is presented in this article as a conventional belief, the kind of thing that everybody knows and accepts as a matter of course. Such bromides are almost always false, like Johnson’s remark, or at least incomplete. Perhaps the greatest value of the Spiegel article, short as it is, is that it demonstrates that a complex situation, such as the cultural impact of printing, copyright and the distribution of books, cannot be reduced to truisms. Complex analysis is required, and Eckhard Hoffner’s research is an example of such analysis.

Hoffner’s discussion suggests two major points to me, both of which contradict the received wisdom about why we need ever-stronger copyright protection.

First, he shows that copyright was never really a great benefit for the majority of authors. The point that an obscure scientist in copyright-free Germany actually earned greater royalties for his book on leather tanning than Mary Shelley did for “Frankenstein” debunks the economic side of the claim that copyright is always a benefit to authors. But it is even more important to recognize, as the article puts it, that “the prospect of a wide readership motivated scientists in particular to publish the results of their research.” Impact and reputation, then as now, were a major motivation for publication, and the higher prices that were made possible by copyright protection often inhibited those sought-after benefits.

Second, it is important to recognize that the real beneficiaries of strong copyright protection have always been intermediaries, as well as a few best-selling authors. Its history in England shows that authors’ well-being was used as a campaigning point by publishers seeking copyright protection, but that it was the publishers themselves who reaped the real rewards, as they always intended. Copyright, Hoffner shows, depressed competition and allowed publishers to make a great deal of money while inhibiting the dissemination of books and knowledge. The irony is that it is only in recent years, as the role of intermediaries has diminished due to digital dissemination, that we can seriously look to a future where copyright protection might be reined in for the overall benefit of learning.

# What is an author to do?

*Tue, 07 Sep 2010 14:06:32, ksmithl2@duke.edu, [category: authors-rights, category: fair-use, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

A fascinating little controversy came to my attention the other day; one of those disputes that seems well outside the arena of academic issues, yet raises lots of questions that scholarly authors need to consider.

The basic facts of the dispute, which are summarized [here on the Techdirt blog](#), are that the author Raymond Carver published a group of short stories in the 1970s and early 1980s that were subject to very heavy revision by his editor at Knopf Publishing, a man named Gordon Lish. It seems that it is Lish, more than Carver himself, who was responsible for the spare, laconic style for which Carver was famous. In fact, Carver's stories were much more sentimental and expansive before Lish finished with them. Now Carver's widow, Tess Gallagher, wants to publish the original, unedited versions of these stories and she is being threatened with a copyright infringement claim by Knopf if she does so.

Two things should be acknowledged up front about this disagreement. First, Carver consented to the changes, although he grew increasingly dissatisfied with them, and legally transferred copyright to Knopf. Second, it is at least arguable that the changes made by Lish really did improve the stories. But each of these acknowledgments also must be qualified. Carver gave his consent to the changes and to Knopf's ownership of copyright, but he pleaded with Lish to stop falsifying his authorial voice, even threatening to stop writing altogether if the editing continued. Unfortunately, Carver was trapped by the publishing system; there was no way he could express himself without the services of Knopf, and Knopf's editor insisted (for a while) on making the changes. And while the changes may have improved the stories, they have obfuscated scholarship about Carver over the years.

A [law review article](#) by Cardozo law student Matthew Weldon discusses this case in detail and describes what options are open to Tess Gallagher. In the process, he offers some nice reflections on the role of an editor, although it is unfortunate that his categories of writing and the kinds of editing appropriate to them does not include academic works. The upshot of his analysis is that US law does not give Ms. Gallagher many options. He considers how the moral rights tradition would protect Carver from drastic changes to his work, but notes that the US has never protected attribution and integrity, in spite of commitments to do so in international treaties we have joined. In the end, the best Weldon can suggest is that the moral rights that underlie this controversy would support a fair use defense if Gallagher decided to go ahead and publish in spite of the threats from Knopf.

It seems to me that this case raises several important questions for academic and scholarly authors to consider.

First, what should the role of an editor of scholarly works be? In copyright controversies, publishers are pushing harder and harder on the idea that they make copyrightable contributions to journal articles. Yet even in the extreme case of Gordon Lish, there is no realistic way to claim that his changes gave him a copyright interest in the stories apart from Carver's transfer of his own rights (as Weldon shows in some detail). And if publishers do make significant changes to scholarly works, we need to ask whether those changes improve the work or undermine it, and how such alterations should be noted in order to preserve the scholarly record.

Second, do scholarly authors need to take steps to protect the integrity of their ideas and their voices from editorial presumptions? Just as with Raymond Carver, the European tradition of moral rights does not function well in the US, so there is little protection, in copyright, for attribution or to preserve the integrity of an author's work. If an author in the US wants a guarantee of attribution, for example, it must be negotiated into the publication contract. So must any guarantees about preserving the integrity of the original work. These "moral" issues are at the very heart of value of scholarly publishing for academics, and yet copyright law does not protect them; there is no legal reason why, after a copyright transfer, the work of an author could not be published in revised form and/or over the name of a different person. Thus extra diligence when transferring copyright may be required for scholarly authors who are concerned about their reputations and about the integrity of the scholarly record.

Finally, the Carver stories, and the failure of copyright law to provide a good solution to that dilemma, causes us to wonder if copyright law as it currently exists really serves the needs of scholarship or if it more often hinders its progress. Certainly studies of the work of Raymond Carver are seriously undermined when critics cannot tell whether they are reading the words of Carver or Lish, and cannot compare the two versions. Carver, of course, was trapped by the publishing system, where dissemination of his work left him no alternative but to acquiesce to his editor's suggestions. But academic authors today are not so dependent, and neither are creative artists. The Internet offers opportunities to distribute work without any role for intermediaries, if the author thinks that is her best course. And a stable online presence, even after traditional publication has taken place, can help an author defend his reputation against misappropriation or corruption of his work.



# Collaboration and the open access movement

Wed, 01 Sep 2010 12:13:08, ksmithl2@duke.edu, [category: open-access-topics]

In anticipation of Open Access Week at Duke, where the theme will be “Collaboration,” we will offer a series of blog posts about basic, and not so basic, issues and opportunities for OA. This first post is from Pat Thibodeau, Associate Dean for Library Services in the Duke Medical Center.

The simplest definition of collaboration is “to work jointly with others or together especially in an intellectual endeavor.” But the open access source Wikipedia [<http://en.wikipedia.org/wiki/Collaboration>] describes it as a “recursive process” where common goals are achieved “by sharing knowledge, learning and building consensus.” As multidisciplinary and global projects increase in number that sharing of knowledge or information becomes very critical. But what happens when one of the collaborators cannot access the information because of a restrictive license, the prohibitive cost of a journal subscription, or the unavailability of publicly funded research data? Collaboration can be hampered if not halted.

The open access (OA) movement is focused on removing the barriers of price, copyright, and restricted use. OA promotes the free flow of knowledge and data that makes collaboration possible and ultimately supports the generation of new innovations, creative ideas and scientific discoveries on a global scale. Collaborators are no longer hampered by institutional or international boundaries.

So has open access actually made a difference?

In fact yes! A recent NY Times article highlighted a research project where data were openly and publicly shared among commercial industries, universities and nonprofit groups in order to find biological markers of Alzheimer’s disease. This “collaborative effort” has led to new research on early diagnostic tests as well as treatments.

[[http://www.nytimes.com/2010/08/13/health/research/13alzheimer.html?\\_r=1&ref=gina\\_kolata](http://www.nytimes.com/2010/08/13/health/research/13alzheimer.html?_r=1&ref=gina_kolata)]

This project is now serving as a model for groups studying other diseases.

In preparation of Open Access Week@Duke (Oct. 18-24), this blog will focus on other topics such as open data, open science, and other elements of the OA movement. As you follow these blog posts, think about how OA could support collaboration at Duke, within your field, or across the world.



[For more information, see the Open Access at Duke web site.](#)

# What is Open Access?

*Fri, 03 Sep 2010 14:19:31, ksmithl2@duke.edu, [category: open-access-topics]*

Continuing our run-up to Open Access week, another contribution from Pat Thibodeau:

Open access (OA) in its purest sense is making literature free online without any fees or restrictions due to copyright or licenses.

The Budapest Open Access Initiative [<http://www.soros.org/openaccess/read.shtml>] was the first to define open access as being publicly free on the Internet, allowing users to read, download, copy, distribute, print, search or link to the full text of articles without legal, financial or technical barriers. Since their statement, others have followed and Peter Suber, one of the true experts on OA, provides an excellent overview and timeline on his Web site: <http://www.earlham.edu/~peters/fos/overview.htm>

Some other important statements are:

Bethesda Statement on Open Access Publishing <http://www.earlham.edu/~peters/fos/bethesda.htm>

Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities  
<http://oa.mpg.de/berlin-prozess/berliner-erklarung/>

While the OA movement initially focused on journal literature, it is now being applied across the realm of scholarly communication including books, learning objects, repositories of various documents, and data sets. In all its permutations, its goal is to ensure free access to information to support academic, research and personal pursuits of knowledge and promote innovation and discovery on a global as well as local level.

The OA movement has had an impact on the journal literature. There are now over 5,300 titles in the Directory of Open Access Journals [<http://www.doaj.org/>] and a 2009 PLOS One article by Bjork et al. [<http://www.plosone.org/article/info:doi/10.1371/journal.pone.0011273>] reports that now 20% of peer-reviewed articles are freely available across all disciplines. This is a major shift since the Budapest statement challenged traditional scholarly communications in 2002.

While Peter Suber's OA chronology [<http://www.earlham.edu/~peters/fos/timeline.htm>] identifies very early free-access models, the OA movement has clearly gained momentum since the Budapest initiative issued its statement in 2002.



[For more information, see the Open Access at Duke web site.](#)

# What is Open Science?

Mon, 13 Sep 2010 15:30:55, ksmithl2@duke.edu, [category: open-access-topics]

Our next OA Week posting comes from Michael Peper, Librarian for Math and Physics at Duke:

We've discussed openness in terms of publications and data, but this same spirit can apply to the research *process* as well. Science in some ways is necessarily a shared and collaborative process. Scientists work together in labs, they share equipment, materials and human resources and share results in publications. In many cases, however, there was much about the practice of science that has been kept in the dark. Scientists would not share methods, data, preliminary results, etc. until publication, if ever. Recently, however, there has been great interest in trying to answer big questions and solve big problems by joining forces to accomplish work that could never be done by one isolated researcher. Improved cyber infrastructure makes the opportunities for sharing even greater. Many believe that Open Science should not just be adopted for its admirable ideals, but also because open science also holds promise of being better science.

The title of this post, however, is 'What is Open Science?' so perhaps I should actually attempt to answer that question.

The boundaries of Open Science are difficult to define because this idea encompasses other issues related to openness. Transparency, across the entire practice of science, is what defines Open Science. Both [Science Commons](#) and the [Open Science Project](#) lay out their principles of this idea in an attempt to provide it some limits. The spirit of these principles is that there should be transparency to the methods, observations, data collection, data access, communication, collaboration and research tools. Instead of limiting the sharing of the practice of science to publication of selected results, the entire scientific process should be exposed to potential users, collaborators and extenders of the work.

There are a growing number of projects that have embraced these ideals and we can point to a few of them here. Cameron Neylon keeps an [open notebook](#) for his work in the biological sciences on producing antibacterial compounds and also writes for the blog [Science in the Open](#). The [Synaptic Leap](#) is another open lab notebook project to create a way for biomedical researchers to collaborate. The collaborators include Thomas Kepler at the Duke University Medical Center. A final example is the [UsefulChem](#) project which is the brainchild of Jean-Claude Bradley who uses his background as an organic chemist to develop new anti-malarial compounds in an open environment.



[For more information, see the Open Access at Duke web site.](#)

# What is Open data?

*Fri, 10 Sep 2010 06:34:19, ksmithl2@duke.edu, [category: open-access-topics]*

From Paolo Mangiafico, Duke's Director of Digital Information Strategy:

Open Access is about more than just the publications that are the results of research — it's also about the data generated during the research process.

While publications have always been “public” by definition (even if not universally accessible), data has more frequently been made available only on request, or when there's some reason to question the published results.

But there are good reasons to make more data more open more often. A 2009 report from the National Academy of Sciences titled “[Ensuring the Integrity, Accessibility, and Stewardship of Research Data in the Digital Age](#)” makes the case this way:

The advance of knowledge is based on the open flow of information. Only when a researcher shares data and results with other researchers can the accuracy of the data, analyses, and conclusions be verified. Different researchers apply their own perspectives to the same body of information, which reduces the bias inherent in individual perspectives. Unrestricted access to the data used to derive conclusions also builds public confidence in the processes and outcomes of research. Furthermore, scientific, engineering, and medical research is a cumulative process. New ideas build on earlier knowledge, so that the frontiers of human understanding continually move outward.

Researchers use each other's data and conclusions to extend their own ideas, making the total effort much greater than the sum of the individual efforts.

Openness speeds and strengthens the advance of human knowledge.” (p. 59)

While not all data should be kept and not all data can be shared, policies, processes, and infrastructure are being developed in many fields and at many institutions to promote openness of research data wherever possible. One example based here at Duke, the [Dryad repository](#), part of the [National Evolutionary Synthesis Center](#), is working with stakeholders from journals and scientific societies to develop data sharing policies, and a place to deposit data underlying scientific publications. Similar policies have been adopted by funding agencies and are becoming an expectation in many fields.

Making your data openly accessible can also bring more attention to your work.

One study that examined the citation history of 85 cancer microarray clinical trial publications found that 48% of trials with publicly available microarray data received 85% of the aggregate citations. Publicly available data was significantly ( $p = 0.006$ ) associated with a 69% increase in citations, independently of journal impact factor, date of publication, and author country of origin using linear regression.” (Piwowar HA, Day RS, Fridsma DB, 2007 “[Sharing Detailed Research Data Is Associated with Increased Citation Rate](#).” PLoS ONE 2(3): e308. doi:[10.1371/journal.pone.0000308](#))

Want to learn more about open data and how you can share the results of your work? Here are some starting points:

- [Open Data Commons](#)
- [Science Commons](#)
- [Data Sharing and Replication](#)
- [Panton Principles](#)
- [ResearchRemix](#)



[For more information, see the Open Access at Duke web site.](#)

# Open Access and the Metrics of Scholarly Impact

Mon, 20 Sep 2010 08:58:01, ksmithl2@duke.edu, [category: open-access-topics]

By Paolo Mangiafico

No one likes to be judged, and there are plenty of reasons to be wary of quantitative metrics being used to try to paint a complete picture of the value of an individual's work. Yet things like publication and citation counts, "impact factors" of particular journals, the amount of grant dollars a researcher is bringing in, and other measures you can easily ascribe a number to are commonly used to gauge research activity and impact.

New methods and venues for publishing scholarship and tracking how it's being used have kept the debate bubbling on how research impact can or shouldn't be measured. To get a sense of some of the issues, you could start by reading a piece titled "[Scholars Seek Better Metrics for Assessing Research Productivity](#)" from the Chronicle of Higher Education last year or the [Nature special section on Metrics](#) from earlier this year, including the comments from readers at the end of some of these articles.

This post isn't going to wade into that broad debate. Since the focus of this series of blog posts is open access, let's look at how open access is affecting metrics that are commonly used now (specifically, citation counts) and how open access might become the basis for new ways of measuring scholarly impact.

For some years now, the [Open Citation Project](#) has been maintaining a [bibliography of studies](#) measuring the effect of open access and downloads ('hits') on citation impact. This bibliography has links to and summaries of studies going back about a decade, as well as rebuttals and debates about some of them. In general most of the studies tend to show that, compared to toll-access venues, making publications available via open access leads to greater impact, as measured by number of citations. In an [earlier blog post on open data](#), I mentioned a [study that showed similar effects](#) for the data underlying the publications.

Some publishers are now providing metrics on use of and references to research on an article-by-article basis. For example the [Public Library of Science](#) journals provide [article level metrics](#) that include page views and downloads, citation counts from scholarly literature, social bookmarks, blog references, and comments, notes and ratings on articles in the PLoS site. Clearly, any such metrics cannot stand on their own as a pure indicator of value, but a basket of these indicators can provide a more comprehensive picture of trends around how research is being used and referenced.

Metrics like these are likely to become increasingly important as new models for scholarly publishing, including open access, become more common. In an opinion piece from 2007 in the Chronicle of Higher Education titled "[The New Metrics of Scholarly Authority](#)" Michael Jensen ruminated on how scholarly metrics and judgments about authority and value are changing in a world of information abundance, due to new technologies and publishing modes. He argues that "authority 3.0" will be based on a variety of heuristics computed through openly available data. He concludes by saying

"... if scholarly output is locked away behind fire walls, or on hard drives, or in print only, it risks becoming invisible to the automated Web crawlers, indexers, and authority-

interpreters that are being developed. Scholarly invisibility is rarely the path to scholarly authority.”



[For more information, see the Open Access at Duke web site.](#)

# Models for open access — many flavors

Fri, 17 Sep 2010 14:56:25, ksmithl2@duke.edu, [category: open-access-topics]

By Karen Grigg, Associate Director of Collection Services at the Duke Medical Center Library:

Open Access comes in a variety of flavors. The two main types of open access are that of open access journals and self-archiving methods

Open Access journals are those that are freely available to the end-user. Since the reader does not pay for content, costs must be subsidized by the author or the institution. Along with publication fees, submission fees are sometimes charged.

Examples:

[BioMed Central](#), an online publisher of free peer-reviewed scientific articles, is sustained by revenue from institutions. However, the new “Shared Support Membership” allows institutions and authors to share article costs.

[Public Library of Science, or PLoS](#), charges a publication fee that can be paid by the author or the author’s employer. PLoS also relies on donations from foundations.

Self-archiving allows authors to submit their own material online so that it is accessible to the public. There are two main varieties of self archiving; institutional repositories (IR), and Subject Based Repositories. IR are hosted by an institution, such as a university, and bundles all the research output of the institution. Often, the work is done by librarians or IT staff. One such IR is [eScholarship](#) from the University of California. A subject-based repository is hosted independently of an individual institution, and bundles the research output of a subject of discipline. Authors voluntarily self-archive their work on a pre-print server. An example of a subject repository is [Arxiv](#), a repository for- physicists and mathematicians. Finally, authors often post articles on their own web sites, but the ability to do so requires negotiation with the publisher.

There are also some hybrid models of open access. Some publishers allow authors to decide whether or not an article can be openly accessed. Authors who would like their article to be freely available can opt to pay the publishing fee. These fees can be several thousand dollars per article. The Delayed OA model gives public access to journal articles after an embargoed period, often 6 months to 1 year. With a Partial OA journal, certain parts of the journal; often editorials or abstracts, are freely available, while the bulk of the content is for fee. Finally, Retrospective OA allows access to older journal articles that have been digitized.

For more background on Open Access Models, see:

Zhang, Sha Li. “OCLC Systems & Services | The Flavors of Open Access.” *OCLC Systems & Services* 23.3 (2007): 229-34. *Emerald*. Web. 15 Sept. 2010.  
<<http://www.emeraldinsight.com/journals.htm?articleid=1622087&show=html>>.

“Peter Suber, Open Access Overview (definition, Introduction).” *Earlham College — Richmond, Indiana*. Web. 15 Sept. 2010. <<http://www.earlham.edu/~peters/fos/overview.htm>>.

[For more information, see the Open Access at Duke web site.](#)



# Faculty support for Open Access scholarship

*Wed, 22 Sep 2010 07:38:19, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: open-access-topics]*

As we publish a series of posts in this space about open access in preparation for Open Access Week from October 18 through 24, it seems like a good time to interrupt ourselves and note three recent articles in which faculty authors express support, in a variety of ways, for open access to scholarship.

The most extensive and most provocative of these faculty comments about open access is the article by Professor Gloria Origgi about the responsibilities of scholars and the changing world of access. The focus of her essay seems to be the need to move past the slow and antiquated system of traditional scholarly publishing. There is a rather tongue-in-cheek post about her article called "[Let's Stop Publishing Research Papers](#)" in a Chronicle of Higher Education blog, and the full paper, titled "Epistemic Vigilance and Epistemic Responsibility in the Liquid World of Scientific Publications," is [here](#) (abstract is freely available while access to the full paper requires a subscription).

A recent blog post by Duke's Cathy Davidson extends the discussion of open access publication, without actually mentioning the term, as she [considers whether blogs should "count" in tenure and promotion reviews](#). Davidson's conclusion, that blogging is a kind of "service" that is indeed a valuable part of the review of the work of scholars, is, to me, a new perspective on an often-debated topic that really advances the conversation.

Finally there is this [short and simple appeal](#) from law professor Rebecca Tushnet asking candidates for academic jobs to post their work in an openly accessible forum in order to make life easier for hiring committees. Tushnet is not advocating for radical change in the academic job market, as Origgi and Davidson arguably are, but simply wants aspiring scholars to use the available means of digital access to make it easy for those who must evaluate them to find it.

For more faculty comments about the benefits of open access, see the short videos embedded in this web page on [Open Access at Duke University](#).

# The economics of open access

Fri, 24 Sep 2010 07:03:26, ksmithl2@duke.edu, [category: open-access-topics]

When we talk about the economics of open access, the conversation usually begins with the high cost of traditional journal subscriptions. For a nice summary of the argument that the economics of journal pricing is out of control, [this portion of the ACRL toolkit](#) on scholarly communications is an excellent resource. But that is only the beginning of the discussion. There is a lot more to say about open access economics.

One great source to grasp the nuance of the issues is a 2009 issue of the journal [Economic Analysis and Policy](#), which itself made the transition from toll access to open availability under a Creative Commons Attribution license. A special issue of the journal was dedicated to the economics of open access; the full contents are linked to [this blog post](#), which make finding them much easier.

I can especially recommend the first two articles in this special issue of EAP. John Willinsky does an excellent job in “[The Stratified Economics of Open Access](#)” of analyzing traditional publishing market segments and looking at how each is experimenting with open access. Conley and Wooders, in “[But what Have you Done for me lately](#),” ask the very basic questions about what publishing an academic article should cost and what the most economically efficient model for scholarly communications might look like.

As I said, the conversation usually begins with high journal prices. Open access is not a solution, *per se*, to the problem of journal costs, but it is a solution to the access problem that is created by skyrocketing prices. For most academic authors, the issue of how much publishing really costs and how much of a university’s budget is actually going into shareholder value at Elsevier or Informa is very much secondary. Their concern is how to get their work into the hands of those who need it and might be able to use it. High subscription costs prevent that access and thus reduce the impact of scholarly work. That is the problem that new models of distributing scholarship, most of which are forms of open access, can solve.

As Conley and Wooders’ article makes clear, open access is not free in the sense of being without any costs, although consumers of open access articles do get the information they need without charge. Open access models are really about ways to streamline and redistribute the costs of publication so as to solve the access problem that is becoming so severe in the traditional system.

When we talk about the economics of open access, there are two factors that we should not forget. First, there are costs, known as lost opportunity costs, associated with traditional publishing that are recaptured by open access. Every time a researcher or teacher cannot get to the information she needs to do her work, or must obtain it by labor-intensive means like interlibrary loan or direct contact with the author, time and knowledge, which are both worth money, are wasted; open access reduces that loss. Second, open access provides the benefit of greater impact to the scholarly authors of articles made accessible through the various OA models. This benefit for the authors, like the benefit to the reader of quick and toll-free access, increases the overall value of research. When we examine the economics of open access, the increased value of the research itself must be part of the equation.

[For more information, see the Open Access at Duke web site](#)

# Open Access, NIH Style

*Fri, 01 Oct 2010 07:31:11, ksmith12@duke.edu, [category: open-access-topics]*

From Virginia Carden, Administrative Research Librarian, Duke Medical Center Library:

The NIH Public Access Policy was conceived as a way to ensure the public's access to published research results and increase the research impact of NIH funding. With the increasing costs of journal subscriptions, many researchers, as well as patients and members of the general public were finding it more and more difficult to have access to articles on cutting edge research in medicine and science. The Public Access policy requires that NIH research-results, funded with tax payer dollars are available to clinicians, researchers, patients, and others across the United States and the globe.

Starting April 7, 2008 all NIH-funded investigators were required to have a copy of their accepted and peer-reviewed manuscript submitted to PubMed Central, the National Library of Medicine's full-text database. In addition, the manuscript becomes available to the public as soon as possible but no later than 12 months after the journal article is published. Duke has a [website that provides more details about the policy](#) as well as resources to help Duke authors comply with the requirements. There are now thousands of freely accessible articles in the PubMed Central database as a result of this policy.

So what is the difference between open access and public access? Public access primarily focuses on information and publications funded with tax-payers' dollars by local, state and national government agencies. In the case of the NIH policy, only those journal articles, whose research has been funded by the government, become publicly accessible, while the rest of the content may never be freely accessible.

What next?

Now Congressional leaders, as well as librarians, scientists, and consumers are considering whether other federal agencies should follow the NIH public access model. Several bills have been introduced over the past few years along with a roundtable and hearing to explore the issues. Here are other sites you can visit to learn more about public access activities at the national level:

- [Report and Recommendations from the Scholarly Publishing Roundtable](#) (OSTP)
- [Summary: Hearing on Public Access to Federally Funded Research](#)
- [Federal Research Public Access Act](#)

[For more information, see the Open Access at Duke web site.](#)

# Funding and Author Support for Open Access

Mon, 27 Sep 2010 14:40:20, ksmithl2@duke.edu, [category: open-access-topics]

By Adonna Thompson, Assistant Director of Duke Medical Center Library for Archival Collections and Services

In a previous post we discussed the different models for open access, which provided examples of the partnerships and relationships between authors and publishers. It also touched on funding models. In this post I hope to give the reader with a more in-depth understanding of funding issues by providing links to relevant articles, websites, and additional resources.

Funding is a major issue when it comes to publishing within, and sustaining an open access model. Open access journals don't charge subscription or access fees to users, but publishing does cost money. So, who should pay? The [Compact for Open-Access Publishing Equity](#) or COPE provides insight and a possible solution to this issue:

Josh Hadro states the problem succinctly in his *Library Journal* article, "Five Universities Sign Open Access Funding Compact."

"It's hard to bootstrap a new industry model into existence, even in the best of times. And no matter how compelling its conceptual underpinnings may be, open access publishing is subject to the same economic realities as any other kind of publishing."

So far, it appears that the most viable and sustainable model for funding open access publishing is through institutional support. The challenge has been, and will continue to be, getting buy-in from our institutions. Though, several major research institutions and organizations have signed the *compact for open-access publishing equity* and this is a large step in helping to create a sustainable business model for open access.

## Articles and Resources:

ARL: [Reshaping Scholarly Communication](#)

[Funding Scientific Open Access](#)

PLoS Biology – [Essay: Funding the Way to Open Access](#)

Society for Scholarly Publishing — the scholarly kitchen blog:

[Why the Open Access Financial Model Will Continue to Transmogrify](#)

PLoS Biology — [Perspective Article: Institutional Open Access Funds: Now Is the Time](#)

BioMed Central's [major funders of biomedical research](#)

# Where to be during OA week in the Research Triangle

*Fri, 08 Oct 2010 14:18:28, ksmith12@duke.edu, [category: open-access-topics]*

From Rick Peterson, Deputy Directory of Duke's Medical Center Library, comes this calendar of the events held at Duke and at UNC Chapel Hill for Open Access Week 2010:

## **Tuesday, 10/19 2-3:30pm Duke Breedlove Room, Perkins Library**

*Open Access at Duke: Why here, why now?*

Learn more about open access and how you can get more reach for your research. Join colleagues for a short presentation and discussion about the new open access policy and support for it at Duke, and how it will impact you.

Speakers: Paolo Mangiafico, Tim Pyatt, Kevin L. Smith, James Tuttle

## **Thursday, 10/21 9-11am Duke Perkins Library, Room 217**

*Open Access Publishing*

A panel will talk about their experiences with open access publishing and its impact on scholarly communications.

Speakers: Melanie Dunshee, Duke Law Library; Mohamed Noor, Professor, Department of Biology; Mira Waller, Project Euclid; Bora Zivkovic, Scientific American; and Kim Steinle, Duke University Press.

## **Friday, 10/22 9:30 a.m. -5 p.m. Duke Law School, Room 4047 [registration required]**

*Implementing the Durham Statement: Best Practices for Open Access Law Journals*

Sponsored by the Duke Law School J. Michael Goodson Law Library and the Harvard Law Library: A Workshop aimed at student law review editors, designed to present and discuss best practices for law journals as increasing numbers move into electronic publishing. The workshop is also open to law librarians, law review advisors, and all others interested in open access and legal publishing. It will be webcast and promoted to all ABA-accredited law schools. For more information and to register, please see the conference Web site: <http://www.law.duke.edu/libtech/openaccess/conference2010>  
Registration is free, but required.

## **Monday, 10/18 10:30 — 12:00 a.m. in Wilson Library Pleasant's Family Assembly Room UNC**

*"Visualizing Copyright: Debunking Open Access and Copyright Myths about Film and Visual Media."*

## **Monday, 10/18 1-2:30 p.m. in Wilson Library Pleasant's Family Assembly Room UNC**

*UNC "Carolina Digital Repository: A collaborative and flexible model for the preservation of scholarly output"*

*Speakers: Erin O'Meara, Electronic Records Archivist, UNC and Michele Hayslett, Data Services Librarian, UNC*

**Tuesday 10/19 1-2:30 p.m. in 205 Undergraduate Library, UNC** (for Library staff)

*ISC webinar and discussion on "Broader Library Involvement in Building Programs—Librarian Training and Development" is part of a series on "Reshaping Scholarly Communications — Strengthening Programs through Collaboration" from the ARL/ACRL Institute for Scholarly Communications. Join Library colleagues for webinar and discussion. For more information, please visit*

<http://www.arl.org/sc/institute/iscwebseries/index.shtml>

# Going forward with Georgia State lawsuit

*Fri, 01 Oct 2010 13:43:53, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation]*

Judge Orinda Evans of the Federal District Court in Atlanta issued her ruling yesterday on the cross motions for summary judgment in the copyright infringement lawsuit brought by three publishers against Georgia State University over course readings provided to students through e-reserves and the campus course management system. The [text of her decision is here](#).

When a party moves for summary judgment, the hope, of course, is to avoid trial altogether and win your case outright on the basis of the motions and evidence submitted. I had [already said](#) that I thought neither side would succeed at that level, and I was right. But I have to admit to being surprised at how favorable the ruling issued yesterday is to Georgia State; even though the Judge clearly expects to go to trial, there is a lot in her ruling to give hope and comfort to the academic community.

For those who are keeping score, the Judge has granted the defense motion for summary judgment on two of the three claims — direct and vicarious infringement — and denied it in regard to the third claim, which is contributory infringement. The plaintiff's motion for summary judgment has been denied in its entirety. The net result is that the case will go forward on the single issue of contributory infringement.

There are lots of complicated legal issues at work in the judges order. Many have to do with the specific way in which this case is structured to deal with the issue of sovereign immunity and the particular things that have to be proved to avoid dismissal on those grounds. But putting all of that aside for a moment, there are three points that I think are very significant and indicate how the rest of the academic community should regard this case.

First, in her discussion of the type of “indirect” copyright infringement call vicarious infringement, Judge Evans includes a substantial discussion of the economics that underlie providing course materials to students. She acknowledges statements from several faculty depositions that they would not ask students to buy the books excerpted in e-reserves if that option were not available and also that they would not use many of the readings if a licensing fee were necessary. This testimony seems to confirm [the fear that a ruling against fair use would dramatically limit the course materials available to students](#); the upshot seems to be that a ruling against fair use would have significant negative social consequences and little real benefit for the plaintiffs. The fact that Judge Evans is engaging the issue on this pragmatic level bodes well for a decision about fair use that genuinely address the social value of the particular activity and does not simply apply a mechanical analysis.

Second, the judge seems to indicate that the plaintiff publishers have a pretty narrow window for proving infringement. They may not argue either direct or vicarious infringement, but have to focus their claims on contributory infringement. They cannot argue that contributory infringement is shown by the mere provision of systems that may be used for infringing activities; here the Judge is following the Supreme Court precedent that says that a technology does not show “culpable intent” if it is “capable of significant non-infringing uses.” Since e-reserves and course management systems clearly are capable of such uses, the Judge declines to hold that merely making those systems available renders GSU liable for contributing to copyright infringement. So the plaintiffs will have to prove “ongoing and continuous misuse of the fair use” by producing evidence of “a sufficient number of instances of infringement.” The defendants — Georgia State — will then have the burden of proving fair use as to each alleged infringement. It is worth noting that this standard of “ongoing and continuous”

infringement is a specific requirement of the exception to sovereign immunity on which the plaintiff's rely.

Finally, and this is what really caught my attention, is the ruling that the Georgia State copyright policy, which was adopted in 2009, after the case began, "on its face does not demonstrate an intent by defendants to encourage copyright infringement; in fact, it appears to be a positive step to stop copyright infringement." Since the policy looks quite a bit like those used on many other campuses, this is good news. The case regarding contributory infringement will go forward, the Judge says, on the issue of whether the policy is *implemented* in a way that encourages improper application of fair use. This emphasis on the local practices rather than the policy itself will certainly make it easier for other campuses to learn from an eventual ruling and, if necessary, adjust their own implementations to meet whatever standards arise, but it decreases the likelihood that large and dramatic changes will be needed.

It is possible, of course, that this ruling on the summary judgment motions will inspire the parties, especially on the publishers' side, to seek a settlement. I have a hard time envisioning what the grounds for such a settlement would look like, but motivated parties can often find a way forward. If, however, a trial and verdict is in the future, this order increases my confidence that the focus will be on a realistic and pragmatic evaluation of activities that, in my opinion, ought to be considered fair use. Even if the court ultimately agrees with me, we will have a lot of work to do to make sure that we understand the reasoning behind such a verdict and are able to apply it to our own institutional situations. And, of course, an appeal would probably be inevitable. But at this early stage (and it is early, even after two and a half years) it is better to have events trending in your favor than otherwise.



# Why Open Access is important to Duke

*Tue, 05 Oct 2010 14:40:53, ksmithl2@duke.edu, [category: open-access-topics]*

By Paolo Mangiafico

In the [series of blog posts](#) on open access over the past few weeks, leading up to international [Open Access Week](#) in late October, we've been writing about a number of different aspects of open access to scholarship, as a kind of introduction for those who may not be familiar with them. But why are we so interested in open access at Duke University? And what are we doing to promote open access here?

The key reason we're interested in supporting more open access to scholarship is that it helps support the goals and values of universities, and Duke's goals and values in particular. [Duke's strategic plan](#) says that one of our key goals is to apply [knowledge in the service of society](#). Currently, much of the knowledge produced by Duke faculty is published in venues with limited distribution and often very high subscription rates that preclude access by many who would benefit from reading it. Making the research freely available to anyone with Internet access helps to increase the potential number of readers, and opens up possibilities for more people to make use of and build on the research being done here.

We also expect to see benefits for the researchers themselves and the institution. Every author wants to be read, and hopes their work will be widely read and cited, and will be influential. Logically it makes sense, and there are a [growing number of studies](#) that indicate this, that research that is more broadly available is read more often and cited more often. So more openness helps increase the reach and impact of Duke scholarship, which not only helps contribute to the scholarly community and society overall, but also helps raise the profile of Duke scholars and Duke University.

We also recognize that the scholarly communications ecosystem is in transition, based partly on the wide availability of new technologies and partly on the changing methods and workflows of scholars, publishers, libraries, and the broader communities they serve. By supporting open access initiatives locally, we're also contributing to more systemic changes in the scholarly communications ecosystem that may help it align better with the values of universities as noted above, and may also provide incentives for innovations that could enable new kinds of discoveries as well as help make the costs of supporting the ecosystem more sustainable. We recognize that these are things that Duke alone will not be able to change, but for broad change to happen many different actors will need to move in concert, take some risks, expend some resources, shift some incentives, realign some rewards.

We're not just supporting open access at Duke, in other words — we're also supporting the open access movement. At the same time we want to be cautious that any disruptions are not destructive to things that still have value, so the steps we're taking are carefully considered, developed through discussions and collaborations with key stakeholders at Duke and our partners, and with an eye on the effects of our actions as they play out.

In an [interview with opensource.com](#) last spring (from which some of the above text is taken) I expanded on a number of these issues, and refer you to that for more discussion about why open access is important to Duke and to scholarship more broadly.

What are the things we're doing now to help promote more open access at Duke?

A growing list with details is available at the [Open Access at Duke web site](#) but, in brief, here are the key initiatives:

- adoption of a [policy](#) that sets the default to open access for all peer-reviewed journal articles published by Duke faculty. Kevin Smith will be writing more about the policy in this space soon, and for now you can learn more from [these articles](#) from Duke Today around the time of the policy's discussion and adoption in spring 2010.
- removing barriers to publication in open access journals by providing financial support to Duke authors through a fund aligned with the [Compact for Open Access Publishing Equity](#) (COPE). More details about Duke's COPE program are available via [this news story](#) from earlier this week about the launch of the fund and from the Duke [COPE web site](#).
- providing open access to legal scholarship via the [Duke Law School's Scholarship Repository](#), and [open access journals](#), and advocating for new access models via the [Durham Statement on Open Access to Legal Scholarship](#) and the work of the [Center for the Study of the Public Domain](#). An event titled "[Implementing the Durham Statement: Best Practices for Open Access Law Journals](#)" is scheduled for Open Access Week.
- support for open access awareness and participation by the [Medical School's library guides to Open Access](#) and [NIH Public Access policy](#), as well as through their organization of Open Access Week activities.
- making open access the default for theses and dissertations by Duke graduate students, via the [Graduate School's ETD program](#) and the [DukeSpace repository](#).

And in development are a program to support open access journals published by members of the Duke community (using the Open Journal System platform) and explorations of more open educational resources (see the [discussions from the spring Center for Instructional Technology Showcase](#) and "edupunk" Jim Groom's [blog post about Duke](#)) as well as broader accessibility to datasets produced in Duke research.

If you're at Duke, we hope you'll join us at the Open Access Week events being held on campus (see the sidebar of the [Open Access at Duke web site](#) page for details) to learn more and show your support for open access, and if you're not at Duke, look for OA week events near you, many of which are listed on the [Open Access Week site](#).

# The movement for free access to law

Mon, 11 Oct 2010 12:39:51, ksmithl2@duke.edu, [category: open-access-topics]

By Melanie Dunshee, Assistant Dean for Library Services, Duke Law School

It is amazing to see how quickly the annual Open Access event has evolved from a one-day student event led by [Students for Free Culture](#) in 2007 to the global [International Open Access Week](#) organized by SPARC. While the OA movement has its roots in the sciences, open access to legal materials is also a growing movement grounded on principles that open access to legal information promotes justice, transparency in government, and the rule of law. Projects involving both primary legal materials and interpretative materials, particularly journals of legal scholarship, are growing all over the world.

## Primary Legal Materials

Open access for legal materials often focuses on “primary” legal materials, such as legislation, regulations, court opinions, and treaties. Governments have responded to advocates and interested groups to improve access to some of these materials in recent years, for example GPO’s [Federal Digital System](#). Open access advocates also argue for the right of non-governmental organizations, particularly non-profit groups, to have access to these materials so that they can develop systems to maximize discovery and distribution, and provide opportunities to use legal materials in new ways and across jurisdictional boundaries. Authentication and preservation of legal materials in electronic formats present critical and complex issues to solve in order that users of the information can rely on it. Below are just a few examples of projects in this area.

- The [World Legal Information Institute](#) is an international leader in this area promoting free access to legal information and, more importantly, creating search and discovery systems to access materials made available by regional and national legal information institutes in a unified system.

- [Law.Gov](#) describes itself as “A Proposed Distributed Repository of All Primary Legal Materials of the United States” and has recently conducted workshops around the country to promote its ideas and examine the issues involved.

- [Legal Information Institute \(LII\)](#) housed at Cornell Law School has been providing access to legal information since the early 1990’s. “We are a not-for-profit organization that believes everyone should be able to read and understand the laws that govern them, without cost. We carry out this vision by: Publishing law online, for free; Creating materials that help people understand law; Exploring new technologies that make it easier for people to find the law.”

- [American Association of Law Libraries ELIACC](#) This committee has been working on various projects particularly regarding state legal materials, and is currently drafting a uniform law that would serve as a model for adoption in all states, the *Authentication and Preservation of State Electronic Legal Materials Act*.

## Legal Scholarship

Providing open access to interpretive materials about the law is in many ways similar to other disciplines, with scholarly articles as the predominant form of legal scholarship in the United States. For instance, many law schools are using repositories to collect and provide open access to law school

publications and faculty scholarship, including [Duke Law Scholarship Repository](#) launched in 2005. However, the publication system for journals in law is quite different than other disciplines consisting primarily of student-edited journals published by law schools, making the incentives and barriers for OA somewhat different. You might think that law school published journals would be more likely to adopt OA models, but this has not yet generally been the case.

Duke Law School has been a leader in electronic publication of legal scholarship and active promotion of open access to legal information. In 1998, Duke Law made the full content of articles published in its [student-edited journals](#) freely available on the law school's web site. The journal editorial boards were early adopters of the [Open Access Law Journal Principles](#) with a commitment to practices of free, neutral access, and requiring minimal licensing rights so that authors control further dissemination of their works.

The [Durham Statement on Open Access to Legal Scholarship](#) calls for US law schools to stop publishing their journals in print format and to rely instead on electronic publication with a commitment to keep the electronic versions available in stable, open, digital formats. A workshop at Duke Law School exploring issues and best practices for law journals to consider as they move into electronic publishing entitled [Implementing the Durham Statement: Best Practices for Open Access Law Journals](#) is scheduled during Open Access Week on October 22.

# OA policies and future directions

*Mon, 18 Oct 2010 13:05:44, ksmithl2@duke.edu, [category: open-access-topics]*

As we wrap up our series of blog posts on open access topics — you can see the [whole category here](#) — I want to remind readers of three points about open access at Duke and open access in general.

First, the [OA policy](#) approved by the Duke faculty last spring was primarily a unanimous vote in favor of open access in principle. By giving the university a license to make works available in an institutional repository, the policy changes the default for scholarship at Duke to openness. Still, it was clear from the start of the process that participation in the repository program would depend on how easy the process of getting works into DukeSpace is made. Implementation, in this regard, is everything; adding extra work for busy faculty is a unpromising way to get buy-in to a new program. Thus while we hope to unveil a self-deposit portal for faculty during Duke's OA Week observances, we remain committed to using automated processes (automated, at least, from the faculty perspective) as the primary way to get content into [DukeSpace](#). We hope many interested parties, especially amongst the Duke faculty, will join us for a discussion of these plans on Tuesday, Oct. 19.

I love the system in place at Harvard, where much of the work of gathering and verifying citations, then clearing rights for deposit, is done by OAFs — Open Access Fellows, who are student employees. I hope the academic world will soon see lots of OAFs (what a great acronym!) working on many campuses.

Second, the OA policy at Duke is part of a [larger and multifaceted commitment](#) to open access. That commitment ranges from support of national legislation to work on the local repository. It stretches back over a decade, thanks to the leadership of the Law School that Melanie Dunshee described in our previous posting. One new development in that long-standing commitment is the announcement made last week of a [COPE fund at Duke](#). This is a fund designed to help authors pay article processing fees that are charged by some open access journals as a way to replace subscription income. The COPE movement, with a brief acknowledgment of Duke's participation, is described in [this article from Inside Higher Ed](#). That the movement has been slow may be true, but part of the reason for the pace is that the goals of COPE funds are really long-term. The point is not to subsidize a particular journal or even a particular set of authors. Rather, the goal is to create a new incentive structure to encourage journals to consider open access business models and to remove barriers that might exist for authors who want to publish in OA journals.

Finally, I want to encourage readers to look back at this site over the next few weeks for news from the [Berlin 8 Open Access conference](#). My colleague Paolo Mangiafico and I will be traveling to Beijing, the site of the B8 conference this year, with lots of questions about how we can cooperate internationally on open access to scholarship and how our values, goals and methods around OA are similar or different from those in other countries. We will be reporting what we learn in this space, with, I hope, pictures.

# More follies from the permissions market

*Wed, 13 Oct 2010 13:11:47, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: scholarly-publishing]*

I have noticed before that a coincidence of events often drives me to focus on a particular topic in my postings. Last week it was two very different things I read that drew me back to once again consider the inefficiencies of the permissions market for electronic course content.

The first item was an email exchange between our e-reserves staff and Professor Jehanne Gheith, director of the Duke program in International Comparative Studies. Several readings that Dr. Gheith wanted available for her students exceeded our sense of the parameters of fair use, so we attempted to purchase permission for their use. After a long delay from the Copyright Clearance Center, permission was denied and library staff informed Dr. Gheith that the readings would have to be shortened, replaced or removed. Here is Dr. Gheith's reply, which she gave me permission to quote:

I'm actually taking a lot of these down because of the ungenerous policies of the publishers. In the long run, I think that these policies will do the publishers damage: where students might have later bought the books, they are now angry that they are not allowed to use these selections (this seems particularly crazy to me in the case of the LeFanu book which is out of print and which very few people bought anyway!)

I want to make two points in regard to the Professor's reaction. First, the problem may not be a lack of generosity on the part of the publishers, at least in this case. The books in question were full of artworks and illustrations, and it is possible that the publishers themselves do not hold sufficient rights to license reuse. But this fact itself is one of the major reasons that academic institutions need a wider berth for fair use if education is not to be hogtied. If the "thicket" of licenses and assignments results in students not having access to resources for their education, no one is winning. Certainly artists whose works cannot be taught in classrooms around the country are as much the losers as are students.

Second, of course, is the fact that Dr. Gheith confirms what [many of us have feared](#) regarding the pressure from publishers to limit or eliminate fair use for course content in favor of a "pay per use" system. That system will not work to get content to students or money to publishers. The permissions system is too inefficient and the prices too high for it to function in the current educational climate. Professors like Jehanne Gheith will opt to reduce the content available, not because they are willing to settle for less robust pedagogy (after all, she asked students to buy the LeFanu book when it was available), but simply because neither the money nor the time to navigate the serpentine permissions system is available.

If this were not enough to remind me of the sour taste left whenever I have to try to deal with the permissions market, worse news was waiting. In a footnote to her otherwise encouraging [ruling on the summary judgment motions](#) in the publishers' lawsuit against e-reserves at Georgia State, the judge noted that 50% of the plaintiff's costs for the litigation were being paid by the [Copyright Clearance Center](#) (see fn 2 on page 10 of the ruling). This means that hundreds of thousands of dollars that our institutions have paid for permission to use works (often written by our own faculty members) for teaching are being used against us to try to limit our pedagogical options or reach deeper into our already depleted budgets. In spite of its claim that "CCC serves the interests of those who supply content as well as those who use it," this little footnote should remind us that collective rights societies do not serve the interests of higher education. The small amount of money that is sometimes returned

to a few academic authors is never part of the incentive that motivates them to write. And the push to get ever more fees, for which it appears the CCC will go to court if necessary, will continue to force more professors to make difficult decisions just like that made by Dr. Gheith.

# Getting picky about the new ACS agreement

*Thu, 21 Oct 2010 10:31:35, ksmithl2@duke.edu, [category: authors-rights, category: scholarly-publishing]*

Yesterday I was part of a fascinating discussion between librarians and a faculty member who has just become head of the publications board of her scholarly scientific society. She was anxious to learn from librarians about how we approaching bundling deals, pricing policies and open access. Lots of this conversation was really interesting and important for both parties, but the biggest thing I took away from the discussion was the faculty editor's desire to convince her large commercial publisher to make open access options more available and less costly for her authors. She understood that open access would benefit those authors and increase the journals' impact, thus helping to ensure their long-term viability. She also saw through the publisher's hype and grasped that they were really trying to inhibit open access with their policies, not facilitate it.

It was in the context of that discussion that I finally got around to reading the new [Journal Publishing Agreement](#) from the American Chemical Society. The hype from ACS is that their new contract "expands author rights and clarifies author responsibilities." The reality is that ACS authors will continue to be behind the curve in scholarly communications under this agreement.

I have not compared the old and new agreement closely, so I am prepared to accept that this agreement is an improvement over the old one for authors. It does outline quite clearly, in some cases, what authors can do with their own work once they cede copyright, gratis, to the ACS.

In this [post on the Book of Trogoool blog](#), Beth Brown does a nice job of explaining some of the problems with the new ACS agreement. I will amplify some of her points here and also add one very picky and lawyerly note.

Most importantly, of course, the new agreement is a complete transfer of copyright to the publisher. Sometimes authors think they might still hold copyright in earlier versions of their articles, written prior to what they submit. This is probably incorrect as a legal matter, but the ACS is taking no chances. The new agreement specifies that ACS will hold the copyright in all versions of a submitted article. As Brown indicates in her post, and our conversation with our faculty editor also proved, this is moving against the trend in most other sciences and shows why chemists will continue to be disadvantaged by their scholarly society.

Of course, if authors retain sufficient rights to disseminate their work, this problem could be alleviated. But in all three important areas, this is not the case.

First, for authors using their own work with students, that new JPA encourages use of a link to their "articles on request" service. If authors use that, their students will have access to 50 free downloads of the article and, after that, will have to pay a per-use charge. After one year the article on request link will provide free access. So there is a pretty clear attempt to generate some new income by getting students to pay for articles outside of the publisher's subscription income stream. In fairness, however, this is the first listed method of using work with students but not the only one; authors are allowed to post their articles in secure systems for student access.

Next, distribution to colleagues is also limited, this time entirely, to the "articles on request" service described above. Thus authors essentially get 50 free "offprints." After that someone, either the author



herself or the colleague with whom she wants to share her work, must pay. This pay wall is supposed to disappear after 12 months, but by then the window for productive sharing has probably closed.

Lastly, authors' ability to put their work into an open access repository is severely limited. It looks at first glance like authors have pretty broad permission to post their submitted version of their article, but there is a condition. Authors must get written permission from the journal editor that posting of their submitted version does not violate the policies of the particular journal. So this attempt to be clearer about author rights really hides behind the obscurity of potentially various journal demands. When we get to posting the published version, this is allowed only if the author is subject to a mandate, either from a funder or the author's institution. These mandates can be complied with after a 12 month delay. If the mandate requires quicker access, the author is told they must pay for open access through the ACS "Author's Choice" program.

It is interesting that this new policy actually creates an incentive for open access mandates. I'm not sure its authors were really thinking that one through; they just saw OA as a threat and moved to postpone it for 12 months, to the ultimate detriment, we can be sure, of chemistry authors and researchers. Another place the JPA authors were not paying close attention — and this is the nitpicking I promised — was in the clause on "supporting information" that accompanies an article, for which, the agreement says, the copyright transfer is non-exclusive. This is simply poor drafting, since a non-exclusive transfer is essentially an oxymoron. The agreement goes on to clarify that both the ACS and the author have full rights to exercise copyright in such material, which is more or less a "joint authorship" situation. I puzzled over this odd clause with another lawyer yesterday, and our conclusion was that the actual effect of this language, if a court had to interpret it, would probably be a transfer of copyright to the ACS and a license back to the author. But whether that license is itself exclusive or non-exclusive and the exact scope of it is unclear.

This new ACS agreement clearly indicates a desire to stave off open access and to control it in a way that does not threaten the traditional thinking in scholarly publishing. But as our faculty editor indicated yesterday, this traditional thinking is no longer good enough. In her field, she told us, open access journals are arising that pose serious competition to the more traditional journals that she is responsible for. She is already afraid that these OA journals will grow in success and that her journals, with their very limited OA options, will suffer. The same fear ought to grip the ACS. Sooner or later chemists will find new ways to disseminate their research, just as other scientists have already done, and ACS journals will, without further change, begin to decline. OA is a proven benefit to scientific research, and this attempt by ACS to grasp and control it so tightly might just backfire.

# Can we protect “traditional knowledge?”

## Should we?

*Wed, 15 Sep 2010 14:46:06, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

In much of the world, the possibility of providing protection for traditional knowledge — indigenous music, stories, dances and even genetic material — is a very lively topic. Even though such protections are a form of intellectual property right that clearly impacts issues of scholarship and copyright, I have not previously dealt with these discussions in this space. That is largely because of the great uncertainty I feel about the whole issue of whether such protections are appropriate and what form they should take.

It is not difficult to find stories of how native peoples have been exploited for economic gain by companies that will appropriate and market traditional knowledge forms — everything from music to medicine. Such exploitation causes one to think that there is a hole in copyright laws that needs to be filled. But any attempt to expand the scope of our copyright protections, which already seem to cover too much and last too long, is likely to have a detrimental effect on scholarship. Thus I find myself caught between warring impulses — respect for the intellectual creations of native peoples versus the desire to foster widespread knowledge of different cultures. This latter impulse is a corollary of the general belief that a robust public domain is a good thing overall for all societies.

I was finally prompted to address the topic of traditional knowledge by [this announcement](#) that Ghana plans to start enforcing provisions of its 2005 copyright law that create fairly strict protections for “folklore.” This short blog post led me to look at the [Ghana Copyright Act itself](#) to see how it addresses some of the problems that seem inherent in such protection.

One obvious problem is how to define folklore, which is the term used in the Ghanaian law. The definition given at the end of the Ghanaian act is very broad and not terribly specific. Because so many things fall into the category of traditional knowledge, it is important to have clear definitions of the subject matter of protection. Does “folklore” in Ghana, for example, encompass dance? What about traditional medicines? Should such diverse subject matter be treated under the same law as works of authorship?

Another issue is very clearly dealt with by the Ghanaian law — the issue of who owns folklore. In section 4 of the attached document, the law states that “the rights of folklore are vested in the President on behalf of and in trust for the people of the Republic.” However noble the intent, this is an assertion of state ownership over folklore, an assertion which is always open to the challenge about whether the state really best represents the interests of all of the varied and ancient peoples who created this wisdom. Also, because it is the state that holds these rights, the protection of folklore is perpetual.

The protections provided for folklore in Ghana are the same as the copyrights vested in more typical subject matter. Rights in folklore are also subject to the same set of exceptions as Ghana provides for other content, and these are a pretty good set of user rights (found in section 19). No permission is needed, for example, for purely private and personal uses, for quotation in another work (as long as attribution is provided), for use in teaching and “public education” and for news reports, including broadcasts. Many of the uses that would be important to scholars of Ghanaian folklore would be

included in these exceptions except for the fact that they are so often limited by the caveat that for the exception to apply the work must have been “made public.” The problem here is that so much indigenous knowledge may not have been made public in any recognizable way, so scholars of these works may still be forced to seek permission.

To get permission one must apply to a government-run National Folklore Board, established in sections 59-64. Since this Board will both approve or reject the proposed use and set fees, its potential for skewing research into Ghanaian culture seems tremendous. The statements made in this [longer article](#) about folklore from the Minister of Chieftaincy and Culture are very frank in saying that the goal of the board is to exploit folklore as an economic asset of the nation and to “repackage” culture as a source of employment. It seems possible and even likely that those goals could conflict with efforts to study Ghanaian culture and to make its subtleties better known amongst students of Africa around the world. Would the Board deny permission, for example, for a scholarly work that is critical of aspects of Ghanaian folklore on the grounds that such an evaluation could cause economic damage?

Even as Ghana asserts stepped up enforcement of its rules regarding folklore, South Africa is considering new protections for traditional knowledge or “Indigenous Knowledge Systems,” about which more information can be found [here](#), [here](#) and [here](#). Ghana’ approach is apparently quite unusual, so comparison with the South African proposal can be very instructive. And finally, a fuller expression of the reservations one might have about all these attempts to restrict use of traditional knowledge can be inferred, I think, from this [eloquent celebration of the benefits of Open Folklore Project](#) in the United States. I am still unsure how to balance the two approaches, but I remain convinced that balance is what is needed.

# ACTA and the embrace of big government

*Mon, 25 Oct 2010 22:45:25, ksmithl2@duke.edu, [category: international-ip]*

On October 2 the U.S Trade Representative released what has been called the final, or “nearly-final,” [text of the draft Anti-Counterfeiting Trade Agreement](#). ACTA, as it is known, has been the subject of a good deal of controversy for several reasons. First, because much of its negotiation has been in secret. Second, because it seems like an end run around both the WIPO / WTO negotiation process for harmonized IP rights protection and around Congress, since it is billed as an “executive agreement” rather than a treaty and therefore does not need Congressional approval. Finally, rumors have flown that ACTA would force substantive and draconian changes in US law (and the laws of other countries) that would greatly increase the scope of IP protection without legislative action on those topics.

It is clear that this last draft of ACTA is substantially weaker than previous versions that have been released, and a very great deal weaker than what rumor said was contained in the earlier undisclosed drafts. Nevertheless, I still come away from a reading of this text thinking that its primary purpose is to shift lots of the costs of enforcing IP rights from the private industries that hold those rights to government agencies, funded by taxpayers. It is odd (or maybe not odd at all) that large corporations, which generally complain about excessive regulation, seem to embrace “big government” when it serves their interests at lower cost (to them).

Because it is a trade agreement not subject to Congressional oversight, ACTA is not, technically, permitted to change US law. It is billed as an agreement about enforcement of existing laws, not an attempt to enlarge the legal scope of IP rights. That claim, however, is subject to lots of skepticism. Indeed, Senator Ron Wyden of Oregon has [asked the Congressional Research Service](#) to study the current iteration of the agreement to see if and where ACTA requires commitments incompatible with US law.

One change that ACTA was rumored to contain — a “three strikes” provision that would require ISPs to disconnect users who were accused (by the content industries) of copyright infringement — is not found in this text. According to [this article from Bloomberg](#), pressure from Google is the reason we do not have to fight off that particular bad idea. Nevertheless, there are several places, notably in the border security provisions, where this version of ACTA would appear to allow enforcement of IP regulations without judicial involvement, something that seems like a significant change in the way IP law currently works. The whole issue of how the “remedies” sections of ACTA might alter the legal landscape for US citizens is detailed in this article on [“Areas where the Oct. 2, 2010 ACTA text is inconsistent with U.S. law.”](#)

Another place where this text is not as bad as it could be is on DRM. The US did not succeed in getting its negotiating partners to agree to DMCA like provisions; no doubt the abject failure of those provisions to prevent piracy, could with their unfortunate impact on legitimate activities like teaching, contributed to this failure. Nevertheless, legal protection for of some kind for DRM systems is encouraged in this text of ACTA and DRM systems, by definition, extend a content owners control beyond what is provided for in national copyright laws.

There are several definitional problems in this final draft of ACTA. This [post from TechDirt](#) discusses one of them, the definition of “commercial scale,” the breadth of which seems to make lots of essentially private activities into criminal acts. Also, the concept of piracy, which has usually referred to large-scale commercial infringement, is defined in this text as any copying that is not authorized by the rights holder

and which would be infringing under the laws of the country involved. In both these cases we see the ratcheting up of both rhetoric and actual enforcement to a level where all infringement is potentially criminal. Thus more enforcement costs can be transferred from private industry to national governments.

It remains unclear how this “final” text of ACTA will be implemented. Although no additional negotiations are scheduled, there are still significant areas of disagreement that are noted in the text. One important such area is whether or not the provisions apply only to copyright protected goods or also to patented inventions. The countries that were party to the negotiations have up to two years to “sign on” to ACTA but, in its current state, it is unclear what such signers would be agreeing to and how they could implement ACTA in the national laws. Perhaps, after all, this long and expensive process of negotiation will result in nothing more than a bargaining chip for industries to use to move enforcement costs off of their books and on to taxpayers.

# Berlin in Beijing — first impressions

Tue, 02 Nov 2010 08:30:36, ksmith12@duke.edu, [category: international-ip, category: open-access-and-institutional-repositories, category: scholarly-publishing]

[“Berlin 8 at the Chinese National Library of Science”]



The week that my colleague Paolo Mangiafico and I spent in Beijing for the [Berlin 8 Conference on Open Access](#) flew by, so my first impressions are actually being written after our return, based on notes I made during the conference. This post is an attempt at a summary of the event, while later posts will address specific points that arose.

Towards the end of the Conference there was a brief debate between some panelists about whether progress on open access is too slow or “adequate.” Perhaps it is merely indicative of my lack of awareness, but I spent much of the conference being amazed at how deeply the values of the open access movement have penetrated around the world. As I listened to the debate, I was aware that progress on OA might indeed be called slow in the U.S., but that much of the rest of the world is moving forward quite quickly.

A telling sign of the growing influence of the open access movement was the overflowing venues for the meetings held at the Chinese National Library of Science. In addition to the large number of Chinese researchers who attended the events, there were presentations by OA advocates from all over the world; I personally had in-depth conversations with librarians and researchers from Germany, Italy, Austria, Greece, Japan and Lebanon, as well as with a law professor working on open access issues in the Netherlands.

China was more than just a venue for this year’s Berlin Conference or even a symbol of the global reach of open access as a principle of scholarly communications, especially in the sciences. The Conference was itself a significant step toward increasing the openness of scientific research in China, which is the fifth leading nation in its share of the world’s scientific publication. As [this blog post from InTech](#) points out, OA is an important step towards increasing the impact of that high level of research. In his closing remarks to the Conference, Dr. Zhang Xiaoling of the National Science Library reported on the significant

attention that the Berlin 8 event was receiving in the Chinese press and also told us that a summary of the proceedings was being sent to officials in charge of the major research organizations and offices in the PRC. Holding the Berlin Conference in China this year created an opportunity to make a much faster transition toward open access to scientific publications on the level of national policy than has occurred elsewhere.

The panel on which I participated, on legal issues and business models for open access, was indicative of the desire for detailed advice about how to do OA right that was a constant theme from our hosts. We frequently heard that the thicket of licensing issues which can arise was a major obstacle for OA, and my own presentation provided, I hope, a framework for considering how to deal with multiple copyright interests. Much greater detail, and more learned analysis, was provided by Wim van der Stelt of Springer and Lucie Guibault from the University of Amsterdam.

The most important impression that I came away from the Berlin 8 Conference with was about the depth of the conviction within the world-wide research community that open access is a major, and affordable, benefit for scholarship. For example, Wim van der Stelt reported on the SOAP project, a survey of attitudes toward open access among researchers. The finding that 89% of the almost 40,000 researchers who responded to the survey expressed the opinion that open access would benefit their fields was startling to me. Even more encouraging was that 62% said they had already published at least one article in an open access (“gold”) journal. Finally, while 40% expressed the opinion that funding for open access publication was a problem, a larger percentage — 50% — said that OA did not need to cost the author anything.

On this point about costs, Alma Swan of Key Perspectives, Ltd in the UK reported on the economic analysis that she and John Houghton (Victoria University, Australia) have been doing regarding OA. When the costs of OA are balanced against the savings it creates, including subscription savings, reduced transaction costs, and indirect economies based on saved time and effort for researchers, each scenario that was studied — self-archiving, “overlay” journals, and OA in parallel with subscription journals — showed substantial savings at a national level. When the analysis is applied to specific universities it was found that all institutions would realize savings from “green” open access, which is self-archiving, while about half would also save money from gold OA. These studies show the practical and localized value of open access that exists in addition to the large societal value, the dollar value of which is presumably also substantial.



# A little justified bragging

Thu, 04 Nov 2010 09:24:35, ksmith12@duke.edu, [category: open-access-and-institutional-repositories]

It is delightful to be able to report on the impact made at the Berlin 8 Conference on Open Access by the presentation on Duke's OA initiatives by Paolo Mangiafico, Duke's Director of Digital Information Strategy. Paolo told a packed room about all of the various ways in which Duke has pursued open access for quite a number of years, starting with a "proto-CC" license used for some of the Libraries' earliest digital collections and culminating, most recently, in the [faculty OA policy](#) adopted in March and the [COPE fund for OA publications](#) announced last month.

[“Paolo Mangiafico at the Berlin 8 Open Access conference”]



The impact of Paolo's presentation was not, I think, because Duke has done OA so much better than other institutions. Other universities have made greater progress on specific initiatives. But Paolo laid out a framework of what is possible that became a kind of touchstone for the rest of the conference. The diversity of the efforts he outlined gave later presenters a way to relate what they were doing at their institutions to the overall universe of OA projects. Since reports on institutional open access strategies and policies made up a significant portion of the sessions, this framework really helped others place their own efforts, and I heard many references back to Paolo's talk as the conference progressed.

Since all of the presentations from Berlin 8 have now been uploaded to [the Conference website](#), I recommend Paolo's slides, which are the first ones in session four, as well as all of the diverse presentations that went in to this fascinating conference.



# Staying out of boxes

*Sun, 07 Nov 2010 07:07:42, ksmith12@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

One of the observations that gradually dawned on me as I listened to the presentations made at the Berlin 8 Conference on Open Access was that there was a clear difference between those countries, like the US, where scientific publishing is dominated by commercial publishers and those where the majority of the publishing is still controlled by scholarly societies. Where commercial publishers are the dominant force, open access almost always involves some form of “author pays” model where article processing fees are used to substitute for the perceived loss of subscription income. In those countries, funding for open access is often difficult and controversial.

This model, however, is not the only option for supporting gold open access. Two different speakers reminded the audience that 80% of open access journals do not, in fact, charge article processing fees. Those journals seemed to be largely published by scholarly societies; that was certainly the case for the STM journals published in China, about which Mr. Chu Jingli of the Chinese Academy of Science reported. The support mechanisms for open access journals proved to be much more various once we got away from the scenario where commercial publishers, with their constant need for greater profits, dominated.

Dieter Stein from the University of Dusseldorf gave one example of a suite of successful open access journals in the field of linguistics. Stein is the editor of the [e-Language portal](#) for the Linguistics Society of America, which publishes six journals using the Open Journals System. Stein emphasized that neither author nor reader pays for publication in these journals. The society supports open access because it sees substantial benefits from publishing in that way. Stein indicated that the Society had seen a substantial increase in attendance at its annual conference, resulting in increased income, which it attributed to the broader dialogue about linguistics fostered by its OA journals. I was struck by the parallel with the music industry, where providing lower cost, and sometimes no cost, access to recordings has resulted in larger incomes for artists (if not for recording companies) from live appearances.

The clear message in all of this is that we need to think in new ways and realize that there are many alternative business models for scholarly publication. When we are told, as we often are, that “somebody has to pay for open access” we should remember that the unspoken subtext of this comment is usually that “someone has to *pay me!*” As we examine open access alternatives we must remember that the ultimate goal should be to facilitate the most efficient system of scholarly communications, not support any particular business or business model. The clear message from Berlin 8 was that we need to think outside of traditional boxes, not just about publication as a whole but even about open access support itself.

# B8, OA, GSU and the crux of the matter

*Wed, 10 Nov 2010 07:18:50, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

During both the Berlin 8 conference and the Open Access Week events at Duke, the word “sustainability” was everywhere. At the conference in Beijing, for example, the question was posed to some publisher representatives about what they needed to support OA. Their answer was a sustainable income, not surprisingly. Similarly, at a panel discussion on OA here at Duke, several Duke Press employees posed pointed questions to panelists challenging the idea that open access offered a sustainable business model.

From one perspective, this emphasis on sustainability is a reflection of how tied we are to traditional economic models for publishing. In many other areas of university life we are willing to try experiments and even to invest money without any certainty of a demonstrable profit. No one asks if student counseling services or intramural sports are “sustainable;” they are simply services we know we need to provide. Yet with something as important as scholarly communications we are bound to a question that misdirects us from the fundamental values of the enterprise.

While I was in Beijing I took a break from the conference to read the latest filing in the Georgia State copyright infringement lawsuit. The plaintiff publishers, having sustained a major setback in the judge’s ruling on the motions for summary judgment, have filed a motion for reconsideration. They specifically want the judge to reconsider her rulings that the only continuing cause of action is contributory infringement and that the case should go forward only on the alleged infringements detailed in filings already before the court. Without commenting on the substance of this motion, I was struck by how tied the arguments were to the notion that publishers owned valuable property that could not be shared with others absent continuing payments to those owners. And this is where sustainability came back to the fore.

Traditional scholarly publishing is built on a model where publishers obtain the content they publish for free, then charge universities and others to get that content back. Often those costs are repeated for each new form the content takes; the GSU case is really about whether new types of course reserves will require an additional payment. This model, I suggest, is the one that is really not sustainable. The traditional model relies on the willingness of scholars to give away the fruits of their labor for free, something that made sense when scholarship was an economy based on scarcity. But in the digital environment we no longer have an economy of scarcity, and the options for disseminating scholarship are many and varied. The Georgia State lawsuit is an attempt to force scholars to conform to an outdated model; even if the plaintiffs were to win in court this is inevitably a losing gambit.

We need to reverse the question of sustainability and ask how long the traditional model of scholarly publishing can be sustained before authors simply refuse to participate any more. It seems that more and more researchers are discovering that this model is not in their best interest; soon the idea of giving away scholarship in order to buy it back will seem a foolish option in a world of online scholarship. As I listened to the talks in Beijing I came to feel that the time is shorter than I had realized. Experiments in open access should be vigorous and varied, even when profitability is not guaranteed, because that is where the sustainable alternatives will ultimately be found. It is urgent that we seek a transition to these new business models precisely because the old one cannot, and should not, be sustained.

# So who gets the money?

*Fri, 19 Nov 2010 11:22:55, ksmithl2@duke.edu, [category: international-ip, category: public-domain]*

In my only [previous foray into the issues of protection for traditional knowledge](#), I was quite critical of the legal regime used in Ghana to claim control and profit over the knowledge creations of indigenous peoples. Even while criticizing the law, however, I admitted that there was a great deal of abuse that needed to be remedied, I just questioned how a remedy could be fashioned. Now I have an opportunity to illustrate that abuse and also give concrete form to my doubts.

This [short blog post](#), with links to other stories, tells how the Colgate company has successfully patented, in the U.S., an herbal toothpaste recipe that apparently has been used for centuries by natives of India. Needless to say, the [Indian government is not happy](#), and the case seems to illustrate the potential abuse of traditional knowledge that the WIPO and other groups would like to remedy.

One question, of course, is whether a patent should be available at all for this product. This is not just an abuse of traditional knowledge but also, from a different perspective, perhaps, an abuse of the public domain. In the U.S., as in most countries, patents are granted only for inventions deemed “novel.” If this mixture of common herbs has been used in India for centuries, where is the novelty? Colgate simply wants to sell to Indians something they have been making for themselves for a long time.

But this raises the second question I want to consider. Is it possible that allowing a patent for this product will actually have a social benefit by making the toothpaste more widely available to those who want to use it? Many Indians probably cannot be bothered to make the paste but would be willing to pay a reasonable price for a pre-made version. If there would, in fact, be a social benefit, perhaps the patent should be allowed. This seems to be the position of the Indian government; their object seems to be to letting an American company make the profit more than it is to the idea of profit itself.

So if a patent is to be allowed, the next step would be to find a way to protect the legitimate interests of the inventors of this traditional formula. That is where the problems really come up, in deciding what those legitimate interests are and whose they are.

For example, are there some groups in India who should be able simply to stop the commercial exploitation of this product? If we determine that there is social value to the commercialization, then we face a situation where protection of traditional knowledge might cause social harm. We might opt to make such a decision out of respect for native peoples, but it is a calculus that needs careful consideration.

If we allow the commercialization, equity suggests that profits should be shared with the native peoples who developed the product. But just who are those peoples? Who stands in the position of representing Indians who have made this dental powder for “perhaps 1000s of years?” The Ghanaian solution is to let the government stand in the place of the indigenous creators of traditional knowledge, and in this patent dispute it sounds like the Indian government would like to follow the same path. To me this question of “cui bono” is the most important and problematic aspect of the debate about protecting traditional knowledge. If we could find a way — and it will be different in nearly every situation — to actually let the indigenous creators garner some benefit from their traditional knowledge, then I am all for doing so. But letting contemporary governments profit from knowledge passed down for centuries amongst people who occupied the same territory that that government now rules — even if, as may be the case, the descendants of those peoples do not, in the current situation, feel well represented by that government — is a very imperfect solution indeed.

# A glimpse into our future?

*Sun, 28 Nov 2010 15:51:43, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: international-ip, category: licensing]*

Access Copyright is the Canadian equivalent of the U.S Copyright Clearance Center. Like the CCC, which is helping to finance litigation against Georgia State University designed to force US universities to pay more and higher licensing fees for course materials, Access Copyright is also on a quest for ever greater income.

I and others have [predicted for some time](#) that a victory in this copyright infringement lawsuit would result in fewer educational options for our students, not more money flowing from university budgets into the coffers of the CCC. Now we have a Canadian parallel that seems to confirm those fears.

The situation for reserve materials in Canadian universities is already far worse than it is in the US. A Canadian judge has ruled that putting required course materials on physical reserve in a library abets copyright infringement (when students make personal copies, presumably). Based on this insane ruling, Canadian schools have been paying \$3.38 per student per year for physical reserves, along with .10 per page for course packs, to Access Copyright. Now Access Copyright wants to change the fee structure and simply collect \$45 per student per year for both physical reserves and course packs.

The upshot of this change, of course, would be a huge cost increase for universities and much higher revenues for Access Copyright. And just as predicted, universities have started to opt for reduced student access in order to avoid a drastic drain on their budgets. The University of Alberta [has announced that it will no longer purchased the vastly more expensive license](#) from Access Copyright and will, instead, simply stop providing reserve readings and course packs for students. Students who cannot afford to purchase all the required readings will, it seems, be out of luck.

Who are the winners in this situation, I wonder? Certainly not the students, who will have less access to course materials and higher costs for their education. The university is obviously a loser too, since its basic mission is impeded. And while Access Copyright will get richer, it is not at all clear that authors will benefit from the increased fees either. Most academic authors — who are usually the ones who write textbooks — do not depend on that small additional income they receive from licensing fees after the large cut is taken by the rights organization. In any case, often the author never sees any of that money; I have [documented several times](#) the situations in which the CCC collects fees for works whose authors it cannot identify. Those are cases where no incentive at all is created, only income for a bloated bureaucracy that feeds on fees that seem to have no rational justification.

When we compare the Canadian situation to the US it is clear that, in spite of some major differences in the law, we may be looking at our own future. Physical reserves are not the problem in the US, since they are clearly covered by our first sale doctrine. But fees for course packs and electronic reserves are climbing all the time, to unsustainable levels. The Canadian system at least has the advantage of a predictable fee structure. As US librarians know, we have no such predictability in our licensing budgets; the fees are inconsistent and capricious. If we are to avoid a similar situation, in which professors are forced to adopt a more cramped and costly pedagogy, we need our courts to recognize that the current system is leading to a system that serves no public interest at all and is injurious to the educational system we have long been so proud of.

# This one is really odd

*Fri, 03 Dec 2010 08:48:19, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain]*

Mark Twain once wrote in his Notebooks that “Only one thing is impossible for God: to find any sense in any copyright law on the planet.” It has been a full century since Twain’s death in 1910 and he is just now presenting us with good evidence for the truth of his comment.

The gist of the story, which is [recounted here and analyzed from an Australian point of view](#), is that Twain left an Autobiography when he died, along with instructions that it not be published until he had been dead for 100 years. Twain’s purpose apparently was to avoid giving offense or committing defamation. That long-awaited publication has now taken place, and the question that interests me is whether the Autobiography has any copyright protection.

Under current US law, the copyright in an unpublished work lasts for the life of the author plus 70 years. That term of protection for Twain’s Autobiography would have expired in 1980. For a currently published work the term of protection is the same, so it is logically impossible to apply that term starting from the time of publication in 2010.

Perhaps we should look at Twain’s expectations in regard to copyright. At the time he died the 1909 Copyright Act had just come into force, with a 28 year term of protection that was renewable for an additional 28 years. This protection was dependent on publication with notice, so perhaps Twain thought that his work would be protected for 56 years after its 2010 publication. But it is unlikely that he could have believed, critically aware of copyright as he was, that the law would not change in that long period of time. It is even more unlikely that the thought of a copyright beginning in the 21st century and lasting 56 years was any motivating factor in Twain’s decision to write his memoirs. So protecting his expectations, whatever they were, would not serve the fundamental purpose of granting the copyright monopoly, which is to provide an incentive for authorship.

If we accept, for the moment, an analogy between copyright and real property, perhaps we should recognize that the copyright in Twain’s Autobiography belongs in the category of intentionally abandoned property, based on his deliberate decision to suppress it past any reasonable term of protection.

I have to admit that I rather hope that someone will challenge the inevitable claim to a copyright that the Mark Twain Foundation will make in this work. I would love to see how a court would sort out these issues.

In the meanwhile, however, I think there is a point to made here about the folly of believing that there is such a thing as a “limited” monopoly, which the Constitution requires that copyright should be. Monopolies serve special interests by allowing prices to rise well beyond the level they would reach in a competitive market. They are so beneficial to those interests that any boundaries imposed on them will always be pushed, tested and expanded whenever they can be. The Mark Twain Foundation has a much stronger reason for asserting a copyright claim, even a baseless one, than any other party has in spending the money necessary to challenge it. The result will likely be a continuing monopoly over a work that rightly belongs to the public; an inevitable but unintended consequence of granting a monopoly and then trying to control it.

About the copyright monopoly Lord Macauley said in 1842 “It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil but the evil ought not to last a day longer than is necessary for the purpose of securing the good.” With the case of Twain’s Autobiography we have a clear situation where the evil Lord Macauley decried has the upper hand and is likely to persist well past any rational justification for its existence.

# Actions speak louder

*Tue, 11 Jan 2011 10:28:28, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: licensing]*

The recent news that the Canadian Recording Industry Association has reached a settlement agreement with artists is not, strictly speaking, about scholarly communications. But it does give rise, I think, to several reflections about the way copyright works for all of us, including scholars.

The story, which is explained [here](#) and [here](#), is basically about how difficult it can be to clear rights to reuse creative and scholarly works. The record companies represented by CRIA found an easy way around this problem. When they could not easily locate a rights holder to pay royalties to, they simply put the work/artist on a “pending list” and went ahead with the planned use. The stated intent was to pursue contact and payment later on, but not to let the delay in locating a rights holder prevent the new compilation CD or whatever. Of course, there was little incentive to continue to try and find someone to pay; hence the lawsuit and the settlement. There are several interesting lessons here.

First, as several commentators note, the content industries that often bellow loudest about respect for copyrights have no interest in showing such respect for other peoples’ rights. The rhetoric of “someone has to pay or no one will create” is usually false and always self-serving. Many people create because they love to do so, and the claims, especially from the recording industry, that big content defends little artists is often contradicted by the former’s actions.

Second, this case is another reminder that copyright has never really been an author’s right; it was created and enforced by intermediaries. The history in England shows that when they could no longer get exclusive royal grants in particular works, the stationers (early publishers) lobbied Parliament for statutory exclusive rights, and used authors as their justification. But content industries have always sought to shortchange creators; their business model depends on doing so, and that is true more in the academic realm than anywhere else.

I have recently been reading a superb law review article by Christopher Sprigman from 2004 called [“Reformatizing Copyright”](#) that makes these arguments very forcefully. Sprigman argues that our “new” unconditional system of exclusive rights has badly exacerbated the problems. It is well worth a read for those who are not already familiar with it.

Finally, it is worth noting that these “pending lists” were really just a solution to what we all recognize as the orphan works problem. When we cannot find a rights holder, can we please just make a list and proceed with our use? We promise to keep trying to contact that rights holder. Of course, libraries that confront the difficulties of using orphan works would always take a much more conservative and careful approach. The pending lists were an excuse, not a solution, but they grew out of that same orphan works dilemma that has grown so intense, especially since we extended copyright protection to everything, regardless of its economic value or the intent of its creator(s). The solutions to the problem will be complex, but only because others will be unwilling to take the slipshod approach taken by the CRIA, those so-called defenders of copyright.

# Economics is a dangerous game

*Tue, 18 Jan 2011 08:09:21, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Late last month an [editorial appeared on a blog](#) for publisher Wiley in which two editorial executives start off talking about online publishing. The discussion is fine, if predictable and self-serving, until it turns to models of open access. “Gold” open access is mistakenly identified exclusively with “author-pays” models, even though the majority of gold OA journals do not charge author-side fees. Then the authors drop this line “The second model is known as the “Green Road.” It might be described as “no one pays” and thus is unlikely to be sustainable.”

This, of course, is nonsense. No one seriously believes that green OA is without cost. What the publishing executives cannot figure out is that the costs of many green OA repositories are being borne by research institutions, and others, because they believe that this form of access to scholarship serves their core missions and is an appropriate investment.

On the other hand, administrators are beginning to doubt whether continued support for commercial publishing is a good investment for them. In a recent EDUCAUSE column, Brad Wheeler from Indiana University wonders “[About that \\$1B per Year](#)” that a group of 257 research universities estimated they spent to buy back the research done on their campuses in 2006. Wheeler is groping his way towards a cheaper OA solution; one that would rest on faculty authors not surrendering their intellectual property for nothing.

A recent study in the UK shows us that the economic drain on universities from the traditional publishing system is even greater than Wheeler suggests. According to [research done by JISC](#), the cost of uncompensated editorial and reviewing work done by British university faculty members is over 150 million pounds per year. Clearly that number would be much larger in the US, where there are more faculty members and more articles published.

As I have [written before](#), if we start having a serious discussion of sustainability, I am not sure the result will be what traditional publishing expects. The traditional publishing system is founded on its ability to free-ride on the intellectual labors of scholars, then sell the results back to the very institutions that actually pay those scholars. Thirty years ago this might have seemed like a sustainable model; today, when digital technology has eliminated the scarcity problem and reduced transaction costs, it does not.

Green open access, and gold OA publishing, represent opportunities for universities to reap more benefit from the research done on their campuses, assert better control over costs, and recapture some of the uncompensated labor that has long been expected from their faculties. In a [recent article on the Scholarly Kitchen blog](#), Phil Davis asserts that it is time to put an end to the “library as victim” narrative and recognize, he says, that we are getting more value for money as the price of traditional journals rises. Only the first half of his argument is supportable; we do need, in libraries, to stop thinking of ourselves as victims. Instead, we should assert our central role in the research process as publishers.

The economics of this transition will not be easy, but they are nowhere near as impossible as the economics of standing pat are, and we are beginning to work them out. In December [this article by a Norwegian economist appeared in First Monday](#), itself a gold OA journal that does not charge author fees, and looked at open access journal publishing. Starting from the observation that the economics looked very inefficient, the author reached a couple of interesting conclusions. First, he decided that



traditional journal publishing and its open access counterpart were about equally inefficient. Second, he issued an indirect challenge to the institutions that support open access journal publishing — many of them academic libraries — to streamline their operations and take advantage of economies of scale. If we continue to progress and to respond to these challenges, we have an opportunity to create the one system of scholarly communications that has a chance at long term sustainability.

# The citation advantage for OA data

*Mon, 24 Jan 2011 13:49:42, ksmithl2@duke.edu, [category: data, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

As an added benefit from the close proximity of the [Science Online 2011](#) conference, we were fortunate, in the Duke Libraries, to have a chance earlier this month to meet and talk with [Heather Piwowar](#). Heather is a post-doc researcher working for the team developing [Dryad, a data repository sponsored by the National Evolutionary Science Center](#), and the author of the [Research Remix blog](#). She is also the corresponding author on a paper published in 2007 in PLoS One documenting the citation advantage gained by scientific papers that make their underlying data available for open access.

Since [the article](#) was new to me, I am writing about it (perhaps selfishly) even though some of my readers may already be aware of its results. It was especially valuable to read it after having a chance to discuss the topic with Heather, who amplified, a little bit, on the possible reasons for the demonstrated advantage. The basic result was that there was a 69% increase in citations for those papers that shared their research data. Both in the article and in our conversation, Heather (and her co-authors) scrupulously noted that this advantage might not be causal. But it is sufficiently significant to lead one immediately to speculate on why it might be causal, and that is where the really interesting possibilities lie.

The most obvious connection between all open access and the documented citation advantage is simply increased visibility. If more people can find an article there is more opportunity for it to be cited in later works. But with data there is another potential connection, which is that other researchers will be able to re-analyze the data and develop new research questions, or new approaches to the same research question, based on that openly available data; as the authors phrase it, “these re-analyses may spur enthusiasm and synergy around a specific research question.”

In our conversations, another possible reason for the citation advantage emerged, and it has a nice parallel with the open access advantage for journal articles. The suggestion was made that open access to data might increase confidence in the results reported in an article and therefore lead more subsequent authors to be willing to rely on that article in their own work. To me, at least, this idea of increased confidence is the data equivalent of the increasingly common report we hear about how open access to the articles themselves increases and improves coverage of scientific research in the popular media. More confidence on the “input” side and better understanding on the “output” side make open access a winning proposition for researchers.

Beyond this citation advantage, and the possible reasons for it, the article goes on to discuss some of the difficulties that researchers encounter when they determine to share their underlying data more openly. These obstacles are especially important for librarians to be aware of, particularly as it is librarians who will frequently be called upon to help researchers develop the data management plans that are now part of the [requirements for researchers](#) funded by the National Science Foundation. Libraries and offices of research support need to become more aware of both the difficulties that researchers might encounter and the benefits they will gain as they consider open access as part of these data management plans.

And finally, in our discussions about open data, Heather talked about another issue that will require the expertise of librarians — the inconsistencies in citing data collections and in tracking those citations. She suggested three steps that would help make data underlying research articles both easier to find

and easier for a researcher to claim credit for. First, DOIs (digital object identifiers) should be used when citing a data set. Second, data sets used for a research article should be reported in the reference list, not merely in the acknowledgments, which do not get tracked by databases. Finally, since some databases strip out references that do not look like traditional articles for their citation reports, library pressure to get data sets treated equally would be very helpful to researchers, for whom the creation of a useful data compilation is a major accomplishment deserving of notice in the promotion and tenure process.

# A more sensible copyright law

*Wed, 02 Feb 2011 10:37:17, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip]*

One of the ways I try to deepen and provide nuance to my understanding of copyright law is to engage in thought experiments about how different alterations to the law might make a practical difference for creators, rights holders and users. Copyright law is so metaphysical (as Justice Story famously observed) that its practical application is by no means intuitive. Anyone who teaches regularly in this area has had the experience of drilling some point home, only to discover that the listeners get the point as an abstraction but cannot apply it. Reading case law is one way to address this difficulty. Another is to ask what difference changes in a particular provision might make in the everyday world.

So when I saw this blog post about [Fair Usage in Caribbean Intellectual Property](#) I saw an opportunity to consider alternative structures for copyright. Ms. Inniss observes, in her brief discussion, that the Jamaican Copyright Act is “the most comprehensive piece(s) of copyright legislation which seeks to balance the interests of both the copyright holder and the end users.” Since I have often commented on the imbalance of US copyright law, here was a chance, I hoped, to see how other decisions might make a real difference. I was not disappointed.

My brief perusal of the [Jamaican Copyright Act](#) has not been either comprehensive or critical; I claim no expertise and nothing I write here should be taken as anything but one of those thought experiments. With that caveat, here are some of the different choices made in Jamaican law, as opposed to that in the U.S., that seem sensible to me:

In its definitions section, Jamaican law defines an “arrangement,” over which the rights holder has control, in a much more exact and limited way than “derivative work” is defined in the U.S (section 2). The Jamaican definition suggests how to protect the legitimate interests of a rights holder without choking off too many creative opportunities that could arguably be considered derivative. Most creativity, after all, is derivative of something, but the degree of dependence and similarity varies a great deal, so more nuance in a derivative works right would foster the goal of copyright.

The term of the Jamaican law is life of the author plus fifty years, and anonymous works are protected for 50 years from first publication. Film and sound recordings are also protected for 50 years, from the time of their creation (sections 10-13). In short, Jamaica has not followed the U.S. down the ruinous route of ever longer terms, but stuck with the minimums required by international law.

Jamaica protects the moral rights of attribution and integrity of the work that are so important especially for scholars, but it subjects these rights to numerous exceptions to avoid preventing socially desirable reuse (sections 14-21). These rights are co-terminus with the economic rights (some last a shorter time, in fact) so they protect significant authorial interests without tying the works on which culture is built to the personality of the author forever (J.D. Salinger, anyone?).

There are no statutory damages available for infringement in Jamaica, although a form of punitive damages are at the discretion of a judge (section 32). This means that unscrupulous rights holders cannot threaten users with immense financial liability before even making their case to a court. The need to prove actual damage is just one of several ways in which the Jamaican law roots copyright protection in unfair business practices, which is, in my opinion, where it rightfully belongs. In this way,

users of creative works who have no financial or competitive interest are not turned into targets for avaricious litigants.

It is important to note that the protection of moral rights in Jamaican law is a major reason that it is possible to make the economic rights more truly economic and focused on protecting real competition. Because reputational issues are unbundled from economic ones, rights holders with very different concerns are not all directed down the same legal paths.

Finally, the exceptions to the economic rights struck me as clearer and more designed to promote the general progress of “science and the useful arts.” There is a fair dealing provision applied to criticism, review and reporting that is exactly like the US four-factor fair use analysis (sections 53 & 54). But there is also a fleshed-out educational exception, so that repeated and socially valuable teaching activities do not depend on the vagaries of a balancing test. There are specific provisions that govern the creation of course packs and electronic reserves for teaching (sections 57 & 59). In the latter case, I might complain that the limits are too strict — 5% of a work and only when no license is available — except for the fact that licenses are governed by a Copyright Tribunal (section 96). Thus educational use is not left to the whims and profit motives of collective rights organizations that operate without oversight (as, for example, the Copyright Clearance Center in the U.S. does). And when all else fails, the Ministry of Justice in Jamaica is empowered to prescribe new exceptions that are deemed in the public interest (section 86).

All these things seem like sensible decisions to me; I hope others will join me in looking at this and other national copyright laws to see what we can learn about how our own law works, fails, and might be improved.

# Contract preemption: an issue to watch

Tue, 08 Feb 2011 08:37:55, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: licensing]

Back in December I wrote about the lawsuit that has finally been filed against UCLA claiming that the policy of streaming digitized view for course-related viewing is copyright infringement. Late in January [UCLA responded with a motion](#) asking the court to dismiss the lawsuit for lack of subject matter jurisdiction and failure to state a claim.

The alleged lack of jurisdiction is based on a claim of sovereign immunity, the idea that the federal courts cannot hear most cases against a state entity as part of the Constitutional scheme called, confusingly, “federalism.” That argument is the bulk of the motion. But there is another issue, one of several involving the alleged vacuity of the claims against UCLA, that caught my attention.

As I noted in my earlier post, the complaint by AIME and Ambrose Video asserts that at least some of the videos at issue are under license and that digitizing and streaming those videos is a breach of that contractual agreement. I questioned earlier whether the license being claimed was, or should be, cognizable. But UCLA is making a different claim in its motion to dismiss, that the state breach of contract claim based on a license is preempted by federal law.

Section 301 of the Copyright Act says that state laws that create “legal or equitable rights that are equivalent” to the exclusive rights in copyright are preempted. Thus state or common law copyrights are mostly superseded by the 1976 federal Act. But two questions have long remained: whether or not this meant that state enforcement of contracts governing intellectual property could be preempted, and what rights are “equivalent” to copyrights.

We routinely assume that “contracts trump copyright;” libraries are told that all the time regarding the databases they license, and they often pass the message on to users. It is generally correct. In one of the most cited cases on this point, *ProCD v. Zeidenberg*, Judge Easterbrook of the 6th Circuit held that a contract creates rights only between the specific parties and thus those rights are not “exclusive” and so not preempted. But the question remains somewhat unsettled, and UCLA is exploiting an apparent loophole in the general rule that we have mostly taken for granted.

In an 8th Circuit case that the Supreme Court left standing, *National Car Rental Systems v. Computer Associates*, preemption was denied, but the denial was based on interesting reasoning — that the contract covered the **use** of the intellectual property, and that use was simply not one of the exclusive copyrights. Professor Nimmer, perhaps the foremost authority on U.S. copyright, picks up this reasoning and suggests that a contract that attempts to “serve as a subterfuge to control nothing other than the reproduction, adaptation, public distribution, etc.” of copyrighted works *should be* preempted. So a contract controlling how licensed property could be used — who could access it, for example — would be enforceable under state contract law, but one that dealt with reproduction, distribution and the other exclusive rights would not be.

UCLA applies this reasoning to say that the alleged video licenses should be preempted insofar as they would govern whether or not making a copy for digital distribution is allowed, since this would be equivalent to the rights under copyright. The upshot of this argument would be that schools could not license away their right to make fair use of content they license, since fair use is a limitation on the exclusive rights and thus part of what would be preempted in any contract action. Fair use would have

to be decided on its own terms, spelled out in section 107 of the Copyright Act, and could not be “ruled out of court” by a contract.

I have long maintained that non-negotiable contracts (like shrink wrap licenses) *should* be preempted by federal copyright law, so that one does not give up rights like fair use without a chance to discuss and defend them. If UCLA argument is successful, it would suggest a broader rule, that contracts that abrogate fair use and other aspects of copyrights exclusive rights scheme would always be preempted. I have no idea if this will fly in the District Court; the case might get dismissed on sovereign immunity grounds so that the issue would not even be addressed. And even if UCLA prevailed on this point, an appeal would be likely. So I am not suggesting that we change our long-standing belief that contracts trump copyright in most case, just that we watch this issue carefully and consider its full ramifications.

# Fair is fair, isn't it?

*Mon, 15 Nov 2010 07:25:05, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: international-ip]*

It was certainly good news to see this [news story from the BBC](#) reporting that Prime Minister David Cameron has initiated a review of the UK copyright laws with an eye toward revisions that would accommodate the way innovation happens in the Internet age. Every country should probably undertake this kind of review periodically, although this [blog post from TechDirt](#) raises doubts about how serious the review will be. In any case, it is worth looking closely at the announcement Cameron made and seeing what we can glean.

First, Cameron was very clear in stating that his attention was turned to this subject when he was told by “the founders of Google” that “they could not have started their company in Britain.” One thing this remark does is remind us of how important short, compelling messages are in capturing the notice of lawmakers. I often wish we could get legislators to pay enough attention to really understand what copyright is for and how it could be improved, but that is a foolish hope. In reality, short messages that cry out for specific action — framing devices that state a clear reason why a politician should care — are vital.

Another thing we learn from this remark is how much Google sees itself as dependent on the U.S. fair use provision. It is precisely a U.S.-style fair use clause that Cameron wants to consider for the U.K. The [Guardian newspaper immediately took Cameron to task](#) for that suggestion, arguing that the government was too much “in the thrall” of “IT giants.” The *Guardian* went on to tell Cameron that there was little difference between fair use in the US and fair dealing in Britain, and that fair use “does not allow what Google does either.”

This latter statement is badly misguided. It is very clear that the heart of Google’s business — the provision of Internet searching and indexing — is fair use and several courts have ruled that way. Perhaps Mr. Arthur of the *Guardian* is thinking about the Google Books project, the fair use issue in regard to which has never been resolved. The utility of fair use for supporting Internet innovation is really hard to dispute, although recent interpretations of fair use in some court cases have not always allowed it to live up to its potential. It is worth taking a minute to see why fair use may be preferable to fair dealing for supporting innovation.

Fair dealing generally refers to a specified set of acts that will not be considered copyright infringement. In the U.K, private and research purposes, educational copying, news reporting and library lending are all among the [acts consider fair dealing](#) (see item 8 in the linked document). But these lists are exclusive; they do not offer the flexibility to encompass new uses and technologies not known when the law was passed. Some of the items on the U.K. list of fair dealings are covered by specific exceptions in U.S. law — library lending, for example, is permitted by section 109 — while others are left to the broad but dubious embrace of fair use. Fair use is an addition to the specific exceptions and is intended to provide exactly the flexibility that fair dealing lacks.

The irony here is that while I agree that Britain needs a fair use provision that would give them the flexibility to experiment and innovate in the knowledge economy, I also envy fair dealing provisions to some extent. If the U.S. had the fair dealing exemption for educational copying, for example, we would be spared the battles over course packs and e-reserves, and education would be somewhat less expensive for our young people. So I think it is a mistake to present fair use or fair dealing as an



either/or choice; a balance between the flexibility offered by fair use and the certainty offered by specific exceptions for common and socially valuable activities is the goal our copyright reform should pursue on both sides of the Atlantic.

The final point I want to make about the BBC report is regarding the comment from the chief executive of the British Publisher's Association, who warned that "The immutable fact remains that the people who generate and invest in creativity deserve and need to be rewarded." This comment is one of those bromides, often heard in the copyright debate, that really means "keep paying me and don't make me change the way I do business." My real dispute is with the phrase "immutable fact." As the knowledge economy changes rapidly, few "facts" will really be "immutable." Indeed, they may not be facts at all; we desperately need better data to assess whether and how well copyright laws actually do provide incentives for authorship and creativity. Certainly we know that there are broad swaths of creators (in academia, for instance) who create without regard for the economic incentives created by copyright.

And there are probably other "facts" we need to consider. As a [panel at a recent meeting of the World Intellectual Property Organization](#) testified, the "Byzantine maze" of copyright regulations is "stalling monetization of new business models." This is the fact to which Prime Minister Cameron is responding, as well as to the charge to treat the need to reform copyright so as to support innovation with the same urgency that we fight piracy of copyrighted works.

# Fashioning innovation

*Wed, 08 Dec 2010 11:02:24, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain]*

I do not usually use this space simply to offer links to other resources without adding my own comments, but [this 16 minute video by Johanna Blakely](#) of the Norman Lear Center at USC — “Lessons from fashion’s free culture” — is so good there is very little I can add.

Dr. Blakely discusses, in a smart and engaging way, the role that intellectual property protections play in providing incentives for creativity and innovation. Her primary example is the fashion industry, where the lack of strong IP rights not only does not hamper creativity but seems, in Blakeley’s argument, actually to support innovation and rapid growth. Her chart illustrating the relative income generated by creativity industries that “enjoy” strong IP protection versus those that don’t may be an oversimplification, but it does provide a strong refutation to the argument that IP protection is necessary for creative industries to thrive and for innovators to pursue their work.

The video is also an excellent lesson in how to do a fun, engaging and informative presentation. I offer it with envy for Dr. Blakely’s skill and confidence that it will be a valuable way for readers to spend 16 minutes. I am just disappointed that I don’t get all of the contemporary cultural references.

# The other shoe drops

*Sun, 12 Dec 2010 14:10:36, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use]*

On Tuesday, Dec. 7, the educational trade group [AIME](#) and one of its members, Ambrose Video, finally [filed the long- anticipated lawsuit](#) against UCLA alleging that UCLA's practice of streaming digitized video through its course management system to students registered for a specific class, was copyright infringement.

When several publishers filed suit against Georgia State University on April 15, 2008, I took note of the date because it seemed the publishers were trying to enforce a new tax on higher education. Now the assault on academic fair use is continuing, but my initial temptation to draw a chronological analogy with the attack on Pearl Harbor — “a day that will live in infamy” — was easy to resist. Not only would such an analogy be disrespectful of the terrible tragedy that took place in 1941, it would also give too much importance to the very strange document that was filed Tuesday in the Central District of California.

The complaint is unusual in several ways. Those who try to read [it off the AIME website](#) will find, for example, that the PDF is riddled with problems in the scanning (one hopes) that make it very difficult to decipher. Also, it is curious that the only named distributor of educational videos is Ambrose. The complaint makes the claim that many others are also being injured, but it does not name them. Instead it inserts a strange defense of the claim that AIME itself has standing without the presence of more than one of its members. This is very different than with the Georgia State Case, where the Association of American Publishers led the search for a defendant but then dropped out and let the actual rights holders proceed. Rumor had it last year that Ambrose, whose CEO is also a leader of AIME, was very keen to sue but was having difficulty convincing his colleagues in the group that that was a good idea. The structure of this lawsuit seems to add credence to that rumor.

Another legal oddity is the decision to sue UCLA for damages as well as injunctive relief, even though the complaint acknowledges that UCLA is “an arm of the State of California.” It would seem that sovereign immunity will be an issue, and AIME has not taken the steps that the GSU plaintiffs did to avoid the potential for dismissal on these grounds.

Much of the argument, of course, centers around fair use. Here too it was surprising to see how the complaint proceeds. It actually does not address the four fair use factors, but makes three arguments about why UCLA cannot claim that defense. First, it says that the videos are all licensed in a way that precludes fair use. Second, it asserts that it offers a licensed streaming service, which presumably goes to the market harm factor in a fair use analysis. Third, it asserts that UCLA is not using “reasonable and limited portions” of the videos. Again, the point here is to argue one of the fair use factors — amount and substantiality — but the language actually comes from the requirements of section 110(2) of the copyright act, not from fair use (section 107).

This last point is interesting because the complaint tries to refute any argument that 110(1) and/or 110(2) might apply to UCLA's practice. It does not acknowledge the possibility, which I hope UCLA will argue, that even when those provisions do not fully apply, attention to the policy behind them and the restrictions place upon them strengthens the case for fair use. For example, if the impact of course-specific streaming is no different than employing 110(1) — the face to face teaching exception — it

argues that there is a Congressional policy that refutes a claim for economic harm. When the complaint itself confuses the language between these exceptions, it points directly toward that possibility.

Licensing, however, is the heart of this complaint, in two ways.

First, Ambrose argues that its licensed streamed service makes a claim to fair use inappropriate. The entire Ambrose catalog is, oddly, attached as an exhibit to the complaint, but only a “sample” of the streamed offerings appears. An examination of the Ambrose website shows that not all of its offerings are available for streaming, but it is hard to tell what the percentages are. So the question arises, how much of the content must be available for licensed streaming before a fair use argument is ruled out? That question would, I think, persist even if a court accepted the claim, by no means obvious, that a licensing market does count to reduce the field for fair use. That latter claim is quite circular and courts have split over its validity.

Second, Ambrose makes the more basic claim that “many” of its products are licensed in a way that entirely precludes fair use, even when UCLA (and the rest of us) have bought a physical DVD. The complaint says that, if the purchase orders for these DVDs are “scrutinized,” licensing terms will be found. That claim made me think about what the Uniform Commercial Code (article 2) calls “the battle of the forms,” where parties to a sale of goods disagree as to what terms apply. Even if the terms found on the purchase orders (or some of them) are held to be valid in some ways (and I think they might be under the UCC) the question still remains as to whether these one-sided terms are adequate to take the use of the DVDs completely out of the realm of federal copyright law. Academic libraries should watch this issue closely, since it seems likely that similar attempts to use purchase order terms of use to abrogate the right of first sale, upon which libraries depend so heavily, will grow.

One finally oddity, from the perspective of academic librarians, should be noted. The Washington lawyer hired by AIME and Ambrose to pursue this case, Arnold Lutzker, is also scheduled to teach an online class on [“Copyright, Photos, Video, Art & Multimedia” for the Center for Intellectual Property at the University of Maryland University College](#) in 2011. This coincidence is a reminder that librarians need to look carefully at the educational opportunities they select and consider whether their common tendency to be excessively nervous about fair use might be reinforced when it should, at least in my opinion, be countered by more in-depth knowledge. We know how to recognize a bias when the Copyright Clearance Center offers to teach us about copyright; we need to be aware that other opportunities may also come with an agenda.

This is obviously a case we will need to watch as it progresses. These comments are based only on the complaint. UCLA will file an answer that will help clarify the issues and, one hopes, AIME and Ambrose will clarify many of the points that are left unclear by this strange initial document.

# Is the sky falling on library lending?

*Fri, 17 Dec 2010 07:01:39, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: libraries, category: licensing]*

“The sky is falling,” Chicken Little cried. I don’t want to emulate that panicky poultry too closely, but recent events have raised some concern in my mind over the continued viability of copyright’s “first sale” doctrine, upon which so much library practice depends.

First sale is the rule that once a lawful copy of a work is sold, the exclusive right to control distribution of that copy is “exhausted.” Therefore libraries can lend books, consumers can resell CDs and NetFlix can rent DVDs through the mail. First sale is not a necessary or automatic part of a copyright law; many countries have different provisions on what is sometimes called “exhaustion,” such as a statutory fee for each library loan of an item. Most importantly, first sale does not apply when a work is licensed rather than sold. Many of the current threats to first sale are controversies over where the boundary between a sale and a licensing transaction really is.

Here is a catalog, quite long I’m afraid, of some of these controversies and, I think, threats to library lending.

First there is the [new lawsuit against UCLA](#) over streamed digital video. Part of that suit argues that what seemed like purchases of DVD by UCLA were really licensing situations because terms of use were printed on the purchase orders. The plaintiffs use this claim to argue that UCLA cannot make a fair use argument in defense of their practice, but it is easy to see how such a claim could also restrict practices under first sale. There have been many attempts to use one-sided terms of use to prevent or control resale; the Supreme Court rejected an early attempt to prevent second-hand resale at a lower price in [Bobbs-Merrill v Straus](#) back in 1908. If a claim based on terms of use in a purchase order is successful in limiting fair use rights under copyright, it is easy to see how such terms will multiply to restrict library lending under first sale.

By the way, it will be interesting to see if these terms can survive analysis under the Uniform Commercial Code. Article 2 of the UCC governs sales of goods, and its provision about conflicting terms of sale (the “[battle of the forms](#)”) might seem to support these terms of use. But two questions occur. First, if the PO terms turn a sale into a licensing transaction, does Article 2 even still apply, since it governs sales? Second, do the terms so materially alter the transaction that they cannot simply be presented on a purchase order and enforced against the purchaser based solely on payment of that invoice?

My second concern comes from the news that a law firm has been sending cease and desist letters to academic libraries demanding that they stop filling ILL requests for scholars and institutions outside of the US. I have not seen a copy of this letter, but the reports suggest that its legal arguments are quite confused. For lending of articles these days, most ILL is governed by the contractual terms under which a database of journals is licensed. If the license permits ILL without territorial restriction, there is no reason to stop following those terms. If the license does not permit such lending, the demand is superfluous. For the lending of physical items, first sale would seem to permit the purchasing library to lend to whomever it wants. But since the lawyer is representing a large group of STM publishers, this letter does remind us that there is a strong desire in the content community to place new and radical limits on long-accepted library practice.

Other threats to first sale do not directly involve libraries, but clearly have potential impact on them. In [Vernor v. Autodesk](#) the Ninth Circuit Court of Appeals upheld the claim that a piece of software was not really sold but only licensed, such that the purchaser could not resell the physical discs he had bought in reliance on first sale. Here again, there are obvious implications for library practice if much of what we think we are buying turns out to have only been licensed.

Finally, there is the [non-decision reached this week](#) by the Supreme Court in the case of [Costco v. Omega](#). That case involved not libraries, but a discount retailer and the claim by Omega Watches that first sale did not apply to copyrighted items (the symbol embossed on the back of watches) that are neither manufactured nor sold in the US. The 9th Circuit (again) held that first sale did not apply and the watches could not be resold in the US without authorization. The Supreme Court agreed to hear the case, and the Library Copyright Alliance filed a superb [brief encouraging reversal](#). But the Court split evenly, with Justice Kagan recusing herself. That result leaves the troubling decision from the 9th Circuit in place, at least in Western quarter of the US.

The problem with the status quo in Costco is that it poses a threat both to some library lending and to the secondary market for used textbooks that is so important for students. The [LCA brief](#) makes clear that affirming the lower court in Costco would leave academic libraries especially in great uncertainty, since they obtain quite a bit of material from overseas. The case involves a technical issue about the so-called manufacturing clauses in the Copyright Act (sections 601-603) because that clause influences what is considered a copy “lawfully made under this title” for purposes of first sale (section 109). Section 602 contains an exception to its restrictions on imports that allows libraries to purchase both books and videos from abroad for their collections, but the language about audiovisual works, which is different from that regarding books, seems to deliberately exclude lending of foreign-made videos. So at the very least, academic libraries in the 9th Circuit must have doubts about whether they can lend foreign films purchased overseas.

Another potential problem created by Costco is for the used textbook market. As [this news story](#) indicates, textbook publishers urged the Supreme Court to affirm the 9th Circuit decision in Costco precisely because it opens the possibility of moving textbook publishing offshore and then relying on the decision to close down resale of used books.

Perhaps the sky is not falling, at least not yet, on the first sale doctrine. Kenneth Crews of Columbia suggests in [this blog post](#) that the *Costco* case, at least, does not give us cause to panic yet. But I think it is pretty clear that the doctrine is besieged from several different angles. Uncertainty about its scope and contours may translate, unfortunately, into less robust library services. The unfortunate scenario is that, just as libraries are being really creative in rethinking our traditional role as “book warehouses,” content providers, sometimes intentionally and sometimes not, seem to be pushing us back into that limited space. The reason, of course, is that the more first sale is restricted, for libraries and for consumers in general, the easier it will be to define the digital realm as a “pay-per-use” environment.

# A book you will never read

Wed, 22 Dec 2010 14:31:39, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

The American Library Association, along with other groups including booksellers and major publishers, make quite a big deal about [Banned Books Week](#) each year. Each year they showcase books that were subject to challenges from people who do not believe those titles belong on the shelves of, usually, public and school libraries.

One of the books that is frequently challenged, especially in schools, and just as frequently defended on free speech grounds, is J.D. Salinger's *Catcher in the Rye*; it is in the top twenty most challenged books on [lists from the past two decades](#) from ALA. So there is a very heavy irony in the fact that Salinger himself and, after his death earlier this year, his estate have been successful in permanently banning a book that tried to update the story of *Catcher*.

I have told the ongoing story of this controversy with posts [here](#), [here](#) and [here](#). Basically, Salinger presented a very weak case that the new book, called "Sixty Years Later; Coming through the Rye," infringed the copyright in the original. Amazingly, the District Court accepted the argument and granted a preliminary injunction. There was a quick appeal, in which the American Library Association and many others joined. The appeal cited procedural flaws in the preliminary injunction as well as the inadequate and incorrect copyright analysis, which clearly conflicts with the free speech values fair use is supposed to protect. The preliminary injunction was overturned on procedural grounds and sent back to the lower court. Unfortunately, the appellate court punted on the free speech issue entirely, and agreed, in a very cursory fashion, with the copyright analysis from the district court; the [ruling on that appeal is here](#), and there is a [comment from Will Cross here](#).

Now the final chapter has played out, as the District Court has issued, by consent of both parties, a [permanent injunction](#) against the publication or distribution of *Sixty Years Later*. Apparently to avoid a costly and drawn out trial, and faced with a deck stacked against them, the author and publisher decided to cut their losses and forgo publication in the U.S.

So this is a book you will never read, if you live in the US. Reviewers have said that it is not very good, but you will not get to decide. If you teach *Catcher*, you will not have the opportunity to have your classes look at this updating of the story and see if it rings true or how else it might turn out. Here we have a banned book on a scale no individual challenging Harry Potter or Judy Blume at their public library could hope to achieve. This is a [book banned by the government](#), something we usually believe our Constitution will prevent.

If we have ever needed evidence that our copyright law has expanded beyond all rational bounds and now threatens our most fundamental national values, this case provides it. The claim that the new work is infringing is based on a disregard of many fundamental copyright principles, include the distinction between idea and expression, as well as the proper application of fair use. Most basic, however, is the failure to recognize what our courts have affirmed repeatedly, that fair use is a safeguard for free speech. Where copyright most needs the fair use exception is when a rights holder tries to suppress critical or unwelcome speech from others by asserting copyright claims. [L. Ron Hubbard](#), [Stephan James Joyce](#) and the [estate of Margaret Mitchell](#) have all been unsuccessful when they tried to do that, but J.D. Salinger has enjoyed an unusual deference from our courts (another example of that deference can be found [here](#)).

So perhaps when Banned Books Week next comes around, we should recognize that Salinger uniquely represents both sides of the First Amendment coin — someone whose own works must still be defended at the same time that he and his heirs misuse the copyright law to undermine that very guarantee of free speech.



# How balanced is the balancing test?

Wed, 29 Dec 2010 07:38:00, ksmithl2@duke.edu, [category: fair-use, category: libraries]

Fair use, we know, is a balancing test. What that means, fundamentally, is that whereas all of the other exceptions to copyright's exclusive rights have a set of requirements or circumstances that must be fulfilled for the exception to apply, the four fair use factors work differently. They are not a list of requirements, such that every fair use must fulfill some standard in regard to each factor. Rather, the four factors describe "an equitable rule of reason" where these factors, and others, are balanced to help a court determine if the specific use in question is, given all of its particular circumstances, fair.

The question of how the factors relate to each other is persistent. If we view them, as I think we should, as inquiries that direct courts to examine pertinent circumstances, they will obviously overlap and interrelate. But courts often apply the factors quite mechanically, with the result that there are quite a few 2 to 2 "ties." In those situations, and at other times, courts will sometimes suggest that one factor or another has more weight or importance than the others. Thus the balancing test can become unbalanced.

One case — *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985) — has been particularly pernicious in its impact. In regard to two factors, readings of this case have contributed to a misconception of the fair use factors.

First, the case was often cited for the proposition that one could not make a fair use of an unpublished work (although it does not quite say this). Such a rule would give the second fair use factor determinative weight when unpublished works were being analyzed. Congress address this problem shortly after the case was decided by amending the fair use provision to specifically say that fair use could apply to unpublished works if the equities favored that use.

The second way in which the *Harper & Row* case impacted fair use was through its assertion that the fourth fair use factor — the impact of the use on the potential market for and value of the work — was "the single most important element of fair use." In its recent [report on "Fair Use Challenges in Academic and research Libraries"](#) a research team associated with the Association of Research Libraries reported on interviews regarding fair use with 65 librarians and identified as one of the common "misconceptions" the belief that the fourth factor was dominant, especially in regard to video. Since the language quoted above from *Harper & Row* is still out there as part of a Supreme Court precedent, it is worth asking why this belief is, at least sometimes, misleading.

One reason is that even the Supreme Court changes its mind. In its more recent fair use reasoning, the Court focused on the transformative nature of a new use, and emphasized that when a use is transformative, the market analysis is less important. In the well-known "Pretty Woman" case, the court reasoned that transformative uses like parody simply do not occupy the same market space as the original work, so consideration of impact on the market is not as important.

If we generalize this reasoning a bit, it has two important results. First, it reminds us that the factors interrelate in such a way that the importance of one factor may be influenced by facts uncovered as part of the analysis of another factor. That is how fair use ought to work, IMO. Also, the Pretty Woman case, and the transformative analysis in general, is an example of how fair use prevents a plaintiff from using copyright to stifle free speech about the original work. If parody or criticism were subject to an absolute rule about market impact, a critical book review could be enjoined because its quotations from the

original, combined with a negative judgment on that original, would inhibit sales and should not, therefore, be judged fair use. We should never allow copyright to work that way, and the flexibility of fair use is a safety valve against should restraints on speech.

Another factor that sometimes gets out of hand is the third one — the amount and substantiality of the portion used. The ARL Report identifies as another misconception the idea that fair use can only apply to a small portion of a work. In fact, many cases that find in favor of fair use, especially cases involving transformations, allow the use of quite large portions of an original. As [this blog post reports](#), a law professor has recently filed an [amicus brief](#) in a copyright case making exactly this point, that even using an entire article does not preclude fair use if the other factors support it. As the brief points out, if there were an absolute rule against using an entire work, fair use would become “an inflexible, one-factor test.”

The lesson from all this, that a fair use analysis must plod through all the factors in light of the specific circumstances and is never subject to “short cuts,” may not be welcome news for all. But it is, nevertheless, good news, since it reminds us that fair use exists to permit uses that are socially valuable but which cannot be anticipated or encompassed within definitive rules laid down in advance.

# Curb your enthusiasm

Tue, 04 Jan 2011 10:41:19, ksmithl2@duke.edu, [category: notes, category: public-domain]

Happy New Year to all!

Just before and after the first of the new year, I saw a flurry of e-mails and blog posts celebrating this year's Public Domain Day. January 1 is the day on which all the material whose copyright expired during the previous year officially rises into the public domain and becomes free for all to use and transform into new works without the need to ask anyone's permission or consider copyright exceptions.

Unfortunately, I have seen a few messages that overreact to Public Domain Day with claims, for example, that all of the works of F. Scott Fitzgerald (who died seventy years ago, in 1940) are in the public domain. If our copyright law was simpler and more oriented toward helping users know what is what, that might be the case. But it is not; our law has developed into a complex web of provisions that shows no concern at all for clear and understandable rules.

The basic situation is that only **unpublished** works are entering the public domain in the United States right now. **No published works** will become public domain in the US through the expiration of copyright until 2019 at the earliest (assuming the law does not change on this point between now and then).

This severe restraint on the benefits that Public Domain Day ought to bestow on us are nicely explained by Duke's Center for the Study of the Public Domain [on this website](#).

Let's look for a minute at F. Scott. Because he died in December of 1940, his unpublished works do enter the public domain in the United States as of 1/1/11. His published works, however, are another story. If a Fitzgerald work was published between 1920 and 1922, as *This Side of Paradise* was, for example, it is in the public domain. But any works published in 1923 or later, such as *The Great Gatsby*, are still protected. After 1922 (and prior to 1963), a work that was published with copyright notice and the copyright in which was renewed is given a term of 95 years from publication (the initial 28 year term plus a renewal term, after the Sonny Bono Copyright Term Extension Act, of 67 years, ). Thus published works from this time period are protected until at least 2019; — 1923 plus 95 years equals 2018, so works published that year will rise into the public domain on 1/1/2019. The author's date of death does not make any difference for these works.

This distinction seems designed to confuse librarians and other users of works. An archive of Fitzgerald manuscripts, for example, could digitize and make available those items that were never published, or that were published earlier in F. Scott's career (like *Tales of the Jazz Age*). But a manuscript of *Gatsby* or *Tender is the Night* is still subject to protection.

If this isn't confusing enough, the situation is not merely different, but reversed, in some countries. As [this blog post](#) explains, Canadian copyright law has a shorter term — life of the author plus fifty years — but protects **unpublished** works differently. In Canada, the published works of an author who died in 1960 are now PD, while unpublished works by the same author are protected until 2049!

Determining whether or not a work is in the public domain is an unfortunately complex business. Like so much in copyright law, that complexity itself is a discouragement to many worthwhile efforts to make the products of our culture available to future generations.

# Some good examples from abroad

*Tue, 15 Feb 2011 07:26:48, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: international-ip]*

It seems I have been looking at a lot of international comments and writings about copyright lately, for [reasons I explained](#) a couple of weeks ago. Now I have the chance to pass on two really interesting examples of sensible approaches to the reform of copyright law.

When British Prime Minister David Cameron announced that he was ordering a review of the relationship between IP protection and economic growth, [I was one of many who was heartened](#) by the decision. That was especially true because Cameron singled out the possibility, certainly correct but frequently ignored, that fair use provisions could be an essential part of copyright laws that truly foster growth.

Now I am pleased to report that the [review panel for this effort has been named](#). It includes not merely representatives from the traditional content industries, but an economist, two law professors and a specialist in entrepreneurship, as well as one of Britain's most creative media executives. One of those professors, I am happy to say, is Duke's own (but Scotland's native son) James Boyle.

In addition to the desire to hear a diversity of views that is evinced by this panel, there is also strong evidence that the work of the review group will be carried on in an open and public fashion. The [panel has a blog](#) that is being used to recount the various travels and interviews that will go into creating a final report. It should make for fascinating reading.

Both these approaches should be lessons to the Obama administration, whose own [recent report on IP protections](#) is clearly the work solely of "the usual suspects" from traditional content industries and which also worked hard to keep the recent [ACTA negotiations](#) as secret as possible. The contrast could not be more telling.

Back on this side of the Atlantic, there is also a great deal to learn from the ongoing process of copyright reform in Brazil. As Pedro Paranagua explains in [this post on the IP Watch blog](#), there is a lot of pressure being brought to bear on the Minister of Culture, who is leading the effort at reform. That pressure, of course, comes from both sides of the debate. One unfortunate effect has been that the Ministry of Culture itself has [stopped using a Creative Commons license](#) on its website. Paranagua asks if it is inevitable that the process of reform remain polarized and schizophrenic, or if it is possible to take a "both/and" approach to the debate between wider cultural access and fair remuneration for copyright holders.

Needless to say, Paranagua advocates the both/and approach, arguing that both broader access AND fair profits are possible, as well as suggesting that both a non-exclusive list of exceptions and limitations AND a fair use style flexible exception would make for a truly balanced law.

# Shakespeare and copyright

*Fri, 18 Feb 2011 07:22:59, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: technologies]*

On Monday author, attorney and Author's Guild president Scott Turow published an [op-ed piece in the New York Times](#) arguing that copyright protection is vital for creative production and that the Web is a serious threat to authors. Such pieces appear regularly in the Times; every three months or so a different author or artist trots out these arguments. It seems a little bit unfair to critique these editorials because they are usually manifestly uninformed; [several critiques](#) of Turow have already appeared, and I don't want to seem to be piling on.

Nevertheless, Turow offers a chance to drive home a very different point than the one he thought he was making, owing to his woefully unfortunate choice of an example for his piece. The core of the argument is that Shakespeare and his contemporaries flourished because their work was rewarded financially, owing to the innovation of producing plays in an enclosed environment and sharing the income from theater admissions with the playwrights. Turow then analogizes this physical barrier to theater admission with the "cultural paywall" of copyright in order to argue that the Internet threat to copyright must be addressed with stronger laws (his piece was [timed to influence hearings](#) held in the Senate on Wednesday).

Turow chooses Shakespeare simply to show that authors need to make money in order to produce creative work. That point itself is quite doubtful and multiple counterexamples could be ranged against it. But even more basically, the example of Shakespeare actually proves some very different points than the ones Turow thinks he is making.

First, Shakespeare lived before there were any copyright laws in England — the Statute of Anne was adopted almost 100 years after his death — so his productivity is evidence that there are ways to support authorship other than with copyright. In truth, it was not so much his share of theater revenues that paid Shakespeare's bills as it was patronage. And patronage remains important to many artists even today, since revenues from copyright so seldom actually filter down to authors and artists. The National Endowment for the Arts is one such patronage arrangement, as are academic appointments that allow playwrights and poets and musicians to continue to create while still putting food on the table. These kinds of direct support are much more effective, in many cases, than relying on the monopoly income provided by copyright, since most of that money remains with intermediaries. The example of Shakespeare proves that copyright is not an absolute necessity for supporting the arts.

The second reason Turow's choice of a hero for his piece is unfortunate is that Shakespeare was, himself, a pirate (in Turow's sense), basing most of his best known plays on materials that he borrowed from others and reworked. If Boccaccio, or Spenser, or Holinshed had held a copyright in the modern sense in their works, Shakespeare's productions could have been stopped by the courts (as unauthorized derivative works). This is not an unfamiliar point; most schoolchildren are taught that Shakespeare borrowed his stories. It is rather astonishing that Turow would choose Shakespeare to make his argument, therefore, and no surprise at all that TechDirt has reformulated Turow's question to read "[Would Shakespeare have survived today's copyright laws?](#)"

As much as Turow may want to argue that copyright is necessary to support authors and artists, what he really succeeds in proving, unintentionally, is that great art often depends on the ability of artists to borrow from and reshape earlier work, and copyright, in so far as it impedes that process, is part of the problem and not its solution.

# Copyright, rhetoric and name-calling

*Tue, 22 Feb 2011 07:42:03, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

Over the weekend I had an experience with this blog that has never occurred before, at least to me. I was suddenly flooded with long, angry comments denouncing what I wrote in my last post. I received over a dozen comments and other communications in the space of a few hours. I approved six of them for posting before making the decision to close comments, something I have never done before. I reached that decision because the posts were becoming repetitive and hostile. Many people have disagreed with my posts in the past, and I have always approved those comments unless they were mere personal abuse that did not contribute to a discussion, but this concerted effort was new to me.

All this was unpleasant, but I would have ignored it were it not for a coincidence of topic that occurred this morning. One of technology leaders on campus came into my office to tell me about the talk she heard at the [2011 EDUCAUSE Learning Initiatives conference](#) last week. William Patry, who is one of the most well-known authorities on copyright law in the US, gave a presentation on “How to fix copyright” and apparently discussed the article by Scott Turow and others that was the subject of my oh-so-controversial blog post. Indeed, Patry was far less respectful of Turow than I was, calling him “the Glenn Beck of copyright.” My experience with some of Turow’s defenders suggests that the analogy has a grain of truth in it, and it confirms my fear that discussions of copyright are becoming as debased and unproductive as much of the rest of our political rhetoric.

But the point of *this* post, now that I have that off my chest, is to clarify, with the help of Patry, what I was trying to say last week.

My first point, which generated most of the heat, was simply that there were, and still are, lots of different ways by which creative authorship and the arts are supported. I never suggested that patronage should replace copyright, just that it was an alternative available to those who did not have copyright protection, like Shakespeare, or for whom copyright was not a beneficial system, like academic authors today. That some people are able to make their living because of copyright is undoubtedly true, and I have no wish to abolish copyright laws or deny them their livelihoods. But I would like us to recognize that copyright is irrelevant for many creators, who do their work for a variety of different reasons and varied rewards, and that it is an obstacle for some, especially those who teach. That copyright can be an impediment for teaching is illustrated by the law suits going on right now over teaching materials, brought against Georgia State University and UCLA by different segments of the content industries. While we do not need to abolish copyright in order to support teaching, we do need a robust recognition that exceptions to copyright like fair use are an integral part of the overall scheme of protection; without them the law would fail in its fundamental purpose.

This gets me to my second point, which Patry made far better than I did when he pointed out that artistic production in the pre-copyright era, including Shakespeare’s, depended on what we now call fair use. That is, Shakespeare was able to write many of his plays precisely because he was able to borrow and rework material from earlier authors to create something new and, in Shakespeare’s case, unarguably superior. Fair use, or exceptions like it, is an integral part of today’s copyright law precisely because it permits and circumscribes these kinds of opportunities. My concern when Congress is told that they must ratchet up protections and choke off avenues of sharing, especially on the Internet — which was Turow’s [message to the Senate](#) on the same day Patry spoke to EDUCAUSE — is that they are hearing only one side of the story.

UPDATES — Please take a look at the column written about Turow's essay by Professor James Boyle of the Duke Law School at <http://www.thepublicdomain.org/2011/02/22/presumed-guilty/>

Bill Patry's presentation is available at  
<http://www.educause.edu/Resources/HowtoFixCopyright/224238>.

# One ring to rule them all?

Wed, 23 Feb 2011 07:51:13, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: user-generated-content]

How much control an author should have once a book leaves her hands is a fundamental question for copyright law. It arises in lots of contexts, but nowhere more directly than when a different author creates a sequel, a parody, or an homage and the original author objects.

This, of course, was the case with *The Wind Done Gone*, a work that a court ultimately found to be a parody of Margaret Mitchell's classic novel and therefore permissible under copyright's fair use exception. It was also the case with *Sixty Years Later: Coming through the Rye*, which was a kind of sequel or extension of the story of *Catcher in the Rye*. In that case, J.D. Salinger (and, finally, his estate) were successful in stopping publication in the United States because the judge — in a decision I lamented frequently on this site — held that it was not a parody and therefore a potential copyright infringement.

Now comes the news that the estate of J.R.R. Tolkien is trying to prevent the publication of two new books based on the *Lord of the Rings*. One is an English translation of a Russian work that is told from the perspective of Sauron and his forces, who lost the battle Mordor and failed to stop the destruction of the ring; it is [called \*The Last Ringbearer\* and is available as a free PDF download](#). The other is a work (called *Mirkwood*) very similar to the *Catcher* sequel because it features both characters from *LOTR* and Tolkien himself, claiming to be a combination of fiction and literary criticism. These works raise the usual questions of whether allowing this level of control actually serves any social interest, or if we would be better off permitting these sequels and letting the marketplace decide what is good and what is unworthy of attention.

The blog TechDirt has written twice about this issue, and [their suggestion](#) that the *Last Ringbearer* case is very similar to that dealing with the *Wind Done Gone* strikes me as correct. After all, each was a retelling of a classic story from the point of view of a neglected or despised character; surely if one is fair use, so should the other one be. But the second case is not this simple; the [issue being raised is not copyright infringement at all, apparently, but a right of publicity claim](#) on behalf of J.R.R. Tolkien.

The right of publicity is basically a right to prevent others from making money using your name, likeness or (sometimes) voice. It is a right created most commonly by state law, and those laws vary somewhat. In most jurisdictions, a right of publicity survives even after the individual is dead and can be enforced by his or her estate. That is the case with the Tolkien estate, who is attempting to use the Tolkien's right of publicity to prevent the distribution of this second, quasi-literary critical book. They apparently sent the publisher a cease and desist letter, and the publisher has responded with a court action seeking a declaratory judgment.

I want to focus on two issues raised by the unique facts of this case.

First, the right of publicity is an unusual approach, and it is one that seems designed to avoid a fair use defense (since there is no claim of copyright infringement, as there was from Salinger and Mitchell in those two cases). The potential power of publicity rights to suppress unwelcome attention and competition seems even greater than copyright. If it violates Tolkien's right to control publicity for someone else to write a novel/criticism about hobbits, wizards, orcs and JRR himself, could it not also be a violation to write a more serious critical secondary work about the original Trilogy if the estate



disapproved? Here we approach the real threat to free speech and to scholarship that is latent in this kind of publicity right challenge to a new book. Scholarly works that displeased an estate (perhaps the James Joyce estate as well as that of Tolkien) would not even be able to lean on the slim reed (as it has become) of fair use; in its filing for a declaratory judgment on the issue, the putative publisher of *Mirkwood: a Novel About J.R.R. Tolkien* relies directly on a First Amendment argument.

Second, with these two books we are very close to the issue of fan fiction, especially in the case of *The Last Ringbearer* since it is being given away for free. Indeed, fan fiction works based on LOTR are not at all uncommon; the site [fanfiction.net](http://fanfiction.net) list almost 45,000 such works amongst its collection. I spoke about fan fiction at a [symposium at Hofstra University](#) last fall, and I learned preparing for that talk that there are strict norms amongst fan fiction writers against both plagiarism and selling one's efforts, which are intended, usually, as acts of respect. There is no evidence that these norms have been violated by the Russian sequel, but it may still become an issue, mostly because of the attention turned on it by the review in *Slate* linked above.

Fan fiction is often not very good, but it is spontaneous creativity that springs from love for a particular work of creative art, whether it is a novel, movie or TV show. These works should not be seen as infringements, and they should not have to rely on obscurity in order to exist. If a work of fan fiction actually turns out to be good enough for a wider audience to want to read it — *The Last Ringbearer* may be such a work — society is better off for its creation and there is no loss to Tolkien or his heirs if we let the new work thrive alongside the original classic. Neither the purpose of copyright law nor the interests protected under rights of publicity are really harmed by such works, and copyright's purpose is arguably advanced.

[The slides from my presentation on fan fiction are available [here](#)]

# US endorses public domain for TK — Man bites dog!

*Mon, 28 Feb 2011 07:58:48, ksmithl2@duke.edu, [category: international-ip, category: traditional-knowledge]*

From Dave Hansen, J.D., the 2010-11 intern for Duke's Scholarly Communications office:

A while back Kevin wrote a [blog post highlighting the Ghanaian copyright law's](#) treatment of traditional knowledge and folklore. He pointed out two very basic ambiguities in Ghana's domestic protections: (1) How exactly is "traditional knowledge" defined, and (2) who owns it?

These two questions are coming up again this week as a group of intellectual property delegates will meet at the World Intellectual Property Organization (WIPO) headquarters in Geneva [to discuss a draft text for the international protection of traditional knowledge](#). As the WIPO [meeting agenda](#) indicates, the discussion will focus on a heavily annotated draft text produced at the last meeting of WIPO's traditional knowledge working group.

First, delegates must address the contentious question of what, exactly, constitutes "traditional knowledge." Although the working text of the agreement has more bracketed terms than anything else, it generally focuses on protecting three general classes of knowledge: (1) knowledge created or preserved in a "traditional context," (2) knowledge customarily recognized as belonging to traditional groups, and (3) knowledge integral to the cultural identity of a particular community. These definitions, while just as vague as those in the Ghanaian copyright law, are the subject of intense comment and seem likely to change.

What is more interesting is the discussion of who should be granted traditional knowledge rights—a debate which largely centers on the type of protection afforded by the agreement. Traditional knowledge protections can come in two basic varieties: "defensive" and "positive." Defensive traditional knowledge protections ensure that rights to pre-existing content will not become restricted from use by the original community. This protection is typically achieved by instituting a registry or database of existing TK, providing prior art which will defeat future claims of originality or novelty by those trying to assert copyright or patent rights over TK content. Positive protections, however, grant exclusive rights over traditional knowledge that are analogous to the rights granted by copyright or patent law—rights that can be asserted to exclude, license, and profit from particular works. While the draft agreement certainly provides for some increased defensive protections, the bulk of the rights granting language focuses on positive rights.

The implications that this positive-defensive rights debate has on the scope of the global public domain is not lost on negotiators. While defensive protections essentially seek to document what should already be available for public use, positive protections seek to pull some works out of what, in the United States at least, would be considered the public domain. In the comments to the draft text it is clear that some delegates are resisting the push for strong positive rights. Norway and the United States, among others, are asking that the agreement find the "right balance between TK that was subject to protection and knowledge which was or had become part of the public domain." The United States, echoing this concern, cited the WIPO Development Agenda's call to "support a robust public domain in WIPO's Member States" as reason to resist a broad positive rights framework.

On the other end of the spectrum, representatives from developing nations made the point that already traditional knowledge—some of which would be thought of as in the public domain in the United States—is not freely available for anyone to use, and those given access should have responsibilities and obligations extending indefinitely into the future. The representative of one indigenous tribe made the following comment:

Public domain was a western concept that was designed for commerce and was a bargain that was set for a grant of private property rights for a limited amount of time after which knowledge would go into the public domain. Such a concept did not necessarily exist in indigenous knowledge systems.

True enough, but the underlying “commerce” concerns of the western public domain, in the United States at least, go to the very heart of its philosophy on the appropriate encouragement of the “progress science and the useful arts” and the scope of acceptable limitations on free speech.

As the draft text develops, it seems increasingly likely that this agreement will provide the first ever legal definition of the scope of the international public domain—something ACTA, TRIPS, Berne, and all other international IP agreements have thus far failed to do. While the move toward international protection of traditional knowledge has been a long time coming, this deliberate new focus on the scope of the public domain is, hopefully, a sign that that IP and trade representatives from the United States and Europe have (finally) come to acknowledge the importance of a vibrant public domain.

Bringing this back to the world of scholarly communications, positive protections that award rights over certain traditional knowledge works is somewhat worrisome because it is library collections that house some of the rare copies of expressions of traditional knowledge existing in the United States and other developed nations. Expanding international protections may severely curtail what academics can do with those works, and it will almost certainly limit their ability to collect some of these works in the future. The big picture impact of this traditional knowledge agreement remains to be seen, but the scope of the public domain is at play—for traditional knowledge specifically, but inevitably outlining its scope in general—and that is a concern which extends far beyond libraries and the scholarly world.

# Precedent and procedure in Georgia

Fri, 25 Feb 2011 14:02:05, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

As soon as I read this [short note](#) in *Inside Higher Ed* reporting that the 11th Circuit Court of Appeals had barred a pharmacy association from suing the University System of Georgia for copyright infringement because of sovereign immunity, I knew I needed to read the decision and blog about it. It seemed, after all, to have potential relevance in the copyright infringement case against Georgia State University, which could, once a decision is reached, have a much broader impact on higher education. Since this pharmacy case comes from the Appellate Circuit in which the GSU case has been brought, it is a binding precedent for Judge Orinda Evans in the latter case.

Nevertheless, once I [read the decision](#) I discovered two things that reduced its importance in my eyes. First, the report in *Inside Higher Ed* is not entirely accurate; it makes the decision seem more sweeping and categorical than it really is. Second, once we see what was actually decided by the 11th Circuit it is clear that it is not in any way decisive for the Georgia State case.

The decision is difficult to follow and concludes without a clear summary, so I hope that any misreadings I make here will be corrected by others. But as I see it, the 11th Circuit ruling is a split decision for sovereign immunity. On the one hand, the Court upheld the lower court's decision to dismiss the claim for damages from the alleged infringement because it is barred by the rules that prevent federal courts from hearing most cases, especially those seeking money damages, against the states. But on the other hand, the 11th Circuit reinstated the claim for an injunction (an order to stop doing what it is doing) against the Georgia system that relies on the exception to sovereign immunity known as *Ex Parte Young* (after the Supreme Court case that established it).

So *Inside Higher Ed* got it only half right — the pharmacy association cannot bring a case seeking damages against the state entity, but its claim asking for an injunction will go forward. The state is not, *contra* IHE, immune from that type of suit.

The Georgia State Case about e-reserves and course readings in an LMS is itself based on *Ex Parte Young* and seeks only an injunction, not damages. So the pharmacy decision handed down yesterday does not mean that the GSU case must also be dismissed, since the Appeals Court actually upheld the injunctive part of the claim.

Georgia State has also asked the court in its e-reserves case to dismiss based on sovereign immunity, and what this pharmacy case really does is remind us of what GSU must do to win on that point. The issue is essentially whether the court believes that there is a likelihood of ongoing violation of the copyright law or not. In the pharmacy case, the Appeals Court was not persuaded that there was no chance of continuing infringement, so it refused to dismiss and will let that issue be decided at trial. Likewise, GSU has basically said that its new copyright policy means that infringement is a thing of the past and that the new policy ensures that its ongoing actions will be within the scope of fair use. The GSU court has already articulated a standard for what must be proved at trial — the plaintiff must show a substantial number of continuing infringements and the defendant then has the burden of demonstrating that those alleged infringements are really fair use — that looks very much like what the 11th Circuit wants in such cases.

So the impact of this recently decided case on the GSU trial will probably be minimal. One or both of the GSU parties will certainly point it out to the GSU trial court — they are obligated to do so — as a supplemental authority. But even though this appellate decision is a binding precedent in Georgia, it is not, in my opinion, determinative of the issues before the GSU court.

# What's Arnold Schwarzenegger got to do with copyright?

*Mon, 07 Mar 2011 07:26:01, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

I can't ignore termination any longer! This is a copyright subject that has significant implications for academic authors, so it needs to be discussed in this space. But until this week I have not been sure what to say or how to say it. Fortunately I can now point readers to some entertaining explanations of the "termination right" (which sounds like something out of a sci fi film noir).

Basically, the termination right is a mechanism built into to copyright that gives an original copyright owner a chance to reclaim their rights after something less than half the duration of copyright. It is intended to reward creators who trade the rights away relatively cheaply and later discover that they are more valuable than anyone expected.

The termination right is found in section 203 of the Copyright Act and applies to all copyrights except those in works made for hire. It allows an author who transfers her rights or grants an exclusive license to reclaim those rights after 35 years. For the vast majority of copyrights this will not be very important, since few works retain any value at all after that length of time (which is why the life plus 70 term of copyright is so foolish). But there may be academic works written by faculty at our institutions that are still valuable, if not profitable; academic works retain research and historical value long past their period of economic profitability. The termination right is a chance for academic authors to reclaim their rights and consider new ways of making their scholarship available to a broader audience, especially in a time when so many institutions offer an open access repository.

Now is the time to think about termination because works granted copyright under the 1976 act are just now starting to be eligible for termination. Do you have a senior faculty member whose classic work of scholarship has been out-of-print for a while but would be a jewel in your repository? This is the moment to discuss termination (of the copyright!) with that author.

The window for termination is defined in a rather complex fashion, but it is nicely (and humorously) explained in this column by copyright and higher education attorney Zick Rubin, ["I'll Be Back \(in 35 years\)": The Author as \(Copyright\) Terminator](#). Rubin focuses on still-viable textbooks, but termination may be a bonus for authors of out-of-print but still in-copyright monographs as well.

For other formats, termination can be just as important. Consider this [column from Variety](#) about the termination of transfer of music copyright, which is one place where the purpose of termination — to give back to the original creator the chance to capture profits — seems especially likely to succeed.

Readers of both documents will note the theme of 1970's nostalgia running throughout. So just to vary the cultural references, I will also point to this [news report of a court case over Betty Boop](#), the 1930's cartoon icon. The effort by the family of Betty Boop's creator Max Fleischer to recover the ongoing value of Betty was not brought under the termination provisions, of course, and it was not successful. But it still illustrates the problem termination is intended to solve, and it makes reference to other cartoon figures — Spiderman, the Fantastic Four and others — where termination is precisely the tool for copyright reclamation under discussion.

If creators of disco music and cartoon characters can reap a benefit from the termination clause in copyright, there is no reason at all that we should not help our academic authors do the same.

# Did he really say that?

Wed, 09 Mar 2011 07:34:26, ksmithl2@duke.edu, [category: digital-rights-management, category: libraries]

Librarians have raised a [pretty loud outcry](#) (for librarians) about the new e-book pricing policy announced last week by Harper Collins, under which libraries would be able to loan an e-book only a set number of times before having to pay again to continue lending. This model seems unfair to libraries, especially because they would not be able to plan their budgets, since the actual cost of each e-book purchased this way would be unknown and variable. But now publishing consultant Martin Taylor has written a [column praising Harper Collins](#) and telling librarians to suck it up and fork over the money. His core argument is that publishers have “serious concerns” about the impact of library lending on their e-book markets and that “librarians have not managed to address [these concerns].” This, to my mind, is a remarkable statement.

It is not the job of librarians to address the concerns publishers have for their bottom line; to say that we should implies a view that libraries are nothing more than a market, the existence of which is justified only insofar as they serve publisher’s interests. But libraries serve the interests of an altogether different clientele. Public libraries serve the readers of their geographic areas and are responsible to local boards or town councils. Academic libraries serve students, faculty and, often, the local populace, while being responsible for their fiscal management to deans and provosts. Publishers are entitled, if they want, to make a business decision about how they price e-books, but libraries are equally entitled to make a business decision about how to spend their money in ways that best serve their patrons and their institutions. If buying e-books under this new model is not good for our patrons, publishers have no cause to complain or berated us for being out-of-touch.

Taylor suggests that the price for each loan of an e-book under the Harper Collins model is reasonable. But this claim confuses price with value. No matter what the price of each loan is, if the book represents a drain on a library’s resources that cannot be known in advance, it is a bad value. There is almost no scenario in which a library’s money would not be more responsibly spent elsewhere.

Some publishers have always disliked the deference to libraries that is built in to US policy and, under the “first sale” doctrine that is found in section 109 of the Copyright Act, US law. First sale was first formally recognized in US law in 1903, when Bobbs-Merrill publishing tried to control the down-stream pricing of one of their books by placing a statement on the title page claiming that the book could never be sold for less than \$1. When Macy’s department stores offered the book at a discount, Bobbs-Merrill sued and lost in the U.S. Supreme Court. The Court made clear what US lending libraries were already assuming, that once a first sale of a work had occurred, the exclusive right of distribution was “exhausted” and the purchaser could resell, or lend, the book without permission or control from the publisher. It was discontent with this well-established public policy that led Pat Schroeder, when she was president of the Association of American Publishers, to call all librarians pirates.

Since public policy has always been on the side of library lending as a fundamental building block of democracy, publishers now find that the only way they can attack it, and try to develop an income stream they have never had before, is through DRM — technological controls that prevent lending e-books more than a set number of times. Like Pat Schroeder’s rhetoric of piracy, this approach has been tried before, by the music industry. Record companies finally figured out that consumers would prefer not to spend their money for products that have their own obsolescence built in (unless the consumer pays again and again), and they abandoned the use of DRM. The publishing industry is entitled to try



the same failed experiment if they like, but, again, they should not complain if consumers, in this case libraries, choose not to support the model.

Taylor recognizes that the Harper Collins' model would cost libraries money they have never had to spend before — repeated fees to keep loaning content they have already purchased — and he helpfully provides suggestions about where that money should come from. He mentions and rejects the possibility that the publishers might forgo this new income stream. He would be happy to take tax money, but he realizes that this is unlikely. So instead he suggests that library branches be closed and librarians be laid off in order to free up the extra money. That's right; the core of his argument is that we should close libraries so that publishers can make more money. Of course, the libraries that would get closed or under-staffed are always those in places where libraries are most needed, in disadvantaged neighbors or at less wealthy colleges and universities.

These libraries are, apparently, expendable if they cease to serve the narrow (and probably misconceived) interests of publishers at this particular moment in history. This kind of support, I expect, will not do Harper Collins much good; I can only hope that this naked self-interest and disregard for public policy and the general welfare will make Taylor's column what it should be, a rallying cry to libraries and those who support them in city halls, state legislatures and academic administrations to stand up against business practices that threaten their core missions.

# Patent reform, publication and repositories

*Fri, 11 Mar 2011 08:39:38, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Patent reform has been percolating in Congress for quite a few years now, and I have to admit to being caught off-guard when I saw the announcement that a [comprehensive reform package](#) had passed in the U.S. Senate by an overwhelming majority. [This story about the bill](#) (which has not been passed in the House) set off an animated discussion between David Hansen, the intern in Duke's Scholarly Communications office this year, and me regarding the issue the article raises about creating a rush to publication and whether there was a potential impact, if the law changes in this way, on disciplinary and institutional repositories.

This post is necessarily tentative, since neither David nor I are patent experts by any means. Any reader who can correct or clarify our tentative conclusions is welcome to do so. But based on our initial discussions, I think we are in fact likely to see more pressure to publish quickly and that that pressure could give some repositories a more prominent role in communicating scientific research.

Two facts about the patent system and the bill in Congress are relevant here.

First, under both the current system and the proposed new one, an invention must be "novel" to receive a patent. To show that an invention is novel, patent applicants provide a list of "prior art" that shows what their invention is based on and establishes that it represents some new idea or "creative spark." If the prior art anticipates the new invention too completely, such that the new twist seems obvious, that will defeat the application for a patent. An inventor herself, however, is allowed to publish a report of her new discovery, usually in a journal article, and for a period of 1 year that publication will not count as prior art such as to render the invention non-novel. Essentially, the inventor has a one year window to file a patent application after publication of the information about her own discovery.

Second, the new system embodied in the Senate bill would change the priority for who gets the patent in a particular invention when there are rival claimants. The current system in the U.S. awards the patent to the first person to invent the object of the application, regardless of who filed the first application. This seems fair, of course, but it results in significant problems of proof and makes the patent application system lengthy and expensive. The new bill would adopt the system used in most of the rest of the world, where the patent goes to the first person to file an application.

When we understand these two facts, it is easy to see why this proposed change could lead researchers to want to publish their results even more quickly. In the past, delay did not matter as much because if I was the first to invent, I would get the patent in preference to someone who filed before me. Under the new system, an earlier filer could defeat my patent. If I published my results in an article, however, that article can serve as prior art that would defeat the other claimant's application. It would not be prior art for the purpose of my application, however, as long as I filed within one year. Thus there could be pressure to publish articles "defensively," to undermine any applications that beat my own to the Patent Office mailbox.

Also, because of the way academic rewards are structured, academic inventors often want to publish articles about their research even before the invention is finalized in a way that justifies a patent application. That one year window for inventor-authors has served this perceived need to get a peer-reviewed, tenure-supporting article into print even before the application was filed. Under a "first to

file” system, however, the whole process may get telescoped. Since the filing date would matter, researchers might want to publish more quickly and file more quickly in order, again, to defend against another claimant who might also be planning to file.

Assuming there is this added pressure to publish quickly when a patent application is in the offing, disciplinary and institutional repositories may have an important role to play. Researchers already complain that the process of publishing in a journal takes too long, so that publications are really just a formal record of research that is often 6 months to a year out-of-date. The added pressure of defending against a rival patent application would seem to make this delay even less acceptable. Pre-print repositories may be the solution, where a record of research can be “published” such as to serve as prior art to defeat anyone else’s patent application while waiting for the formal process of journal publication to proceed. Since even reports in a single printed dissertation have been held to be prior art for this purpose, I have no doubt that a pre-print in ArXive or some other disciplinary repository would also serve the purpose, as would institutionally-managed repositories.

If the patent law changes and researchers really do start to feel this added pressure, librarians may serve an important role in directing them to appropriate institutional or disciplinary repositories where their pre-prints can “hit the streets” as quickly as possible. And repository managers will need to be sure that they can turn these deposits around in a way that helps our researchers protect their rights.

# Libraries, pricing and piracy

*Thu, 17 Mar 2011 13:07:07, ksmith12@duke.edu, [category: libraries, category: scholarly-publishing]*

I recently told the north Carolina Serials conference that the so-called “journals pricing crisis” had outlasted any meaningful definition of the word crisis and was no longer the driving force behind our discussions of scholarly communications, if, indeed, it ever was. Nevertheless, it simply will not go away, as witnessed by another round of library uproar over publisher prices.

The fuss over Harper Collin’s new e-book pricing model just keeps growing, of course, and on Tuesday [an article about it](#) was on the front page of the dead-tree edition of the New York Times. Of possibly greater significance are the [reports that the librarian from Imperial College London](#) has issued an ultimatum on behalf of Research Libraries UK to Elsevier over the price increase they are demanding for the journal “big deal” package. She is demanding a price decrease in line with library budgetary realities and greater flexibility.

Each time these kerfuffles make the news I ask myself if this will be the one that bears fruit, that actually leads to large-scale cancellations and, just maybe, real change. So often, frankly, libraries ultimately back down because our first concern is always our patrons, and we cannot overlook the need, or at least the desire, that our academic communities feel for these resources. That tendency to give in has led many in the content industries to believe, apparently, that libraries really are bottomless wells of money, down which they can drop a bucket whenever they feel the pinch.

I continue to hope that we librarians will realize, at some point, that reform of the severely broken scholarly communications system will ultimately benefit our academic communities more than continuous access to big deal journal packages will. This is especially so as an increasing number of researchers tell us that they do not use those packages much anymore. Faster and less formal means of getting access to research findings are becoming the norm in many disciplines, from physics to economics. In some cases pre-print repositories are now the major source of the rapid awareness of new research that is needed, in others it is the more informal exchange of ideas prior to formal publication. As more of these paths develop, our dedication to big-deal journal packages will seem increasingly like a relic of a previous age.

This is not to say that the transition will be easy. The road to reform will certainly take us through more painful encounters, both with publishers and with our own faculty. Like so many other librarians, I am anxious for change but hope that other libraries and other librarians (like Deborah Shorley from Imperial) will take the lead in these confrontations.

But it also seems likely that other forces will get publisher attention and force changes in standard business models before we librarians do it. Is Ms. Shorley’s ultimatum more of a threat to Elsevier, I wonder, than a downgraded outlook by a major securities research firm? I doubt it, but Elsevier is facing both those things, according to [this story about a report prepared at Sanford Bernstein](#). If their report the research firm expresses the opinion that Elsevier is “in denial” about the need to reform its business practices and about the unsustainable future of the “big deal.” They predict that Elsevier will “underperform” in the market. Perhaps direct pressure on shareholder value will get the attention that outcries from libraries, followed by capitulation, has failed to capture.

Finally, I want to note that pricing strategy is getting some interesting attention outside of the library environment as well. The Social Science Research Council has just released a massive report, three

years in the making, from their “Media Piracy Project” about intellectual property piracy in the developing world; there are stories about the report [here](#) and [here](#). Perhaps surprisingly, at least to the content industries, they do not blame moral failings for the rise in piracy and they do not recommend increased enforcement (which makes it ironic that the White House has just released [legislative recommendations](#) calling for greater IP enforcement precisely to address piracy). Instead, the report suggests that poor pricing strategies by the content industries are a major factor behind piracy in the developing world and that new business models will be more effective at addressing the problem. Certainly it is obvious that ratcheting up IP enforcement has not worked in the past and is unlikely to suddenly provide a miraculous answer. As for the contention that content industries have followed disastrous pricing policies that undermine their own best interests, librarians have been trying to tell them that for years.

PS. Through Friday, April 15th, all of the Duke Libraries’ blogs will be gathering responses to our first-ever reader feedback poll. Click the survey link in the sidebar to participate. Thank you for your feedback!

# The “traditional contours” of copyright

Tue, 08 Mar 2011 09:07:03, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain]

The Supreme Court on Monday granted certiorari, which is the technical language for agreeing to hear a case, in *Golan v. Holder*, a copyright case with potentially significant implications for the public domain in the U.S. I [wrote about this case](#) back in 2009, when it was first decided by a federal District Court in Colorado. The decision I approved of at that time was subsequently reversed by the 10th Circuit Court of Appeals, and now the Supreme Court has agreed to decide the issue.

This [post from the Patently O blog](#) reports on the grant of “cert” and does a pretty good job of explaining the issue. Basically the problem is that a law passed to reconcile U.S. copyright law with the international treaties that we agreed to in 1988 and after had the effect of removing some works from the public domain. This had virtually never happened before; until the Uruguay Round Agreements Act (URAA) of 1994, things that were in the public domain stayed there, and users could safely depend on their availability for use and reuse. For a subset of materials, however, the URAA changed the rules pretty dramatically and, according to the petitioners, in a way that conflicts with the basic protection of free speech found in the US Constitution. The briefs for the case, including the *amicus* brief filed by the Stanford Fair Use Center and the brief in opposition to cert written by the Solicitor General’s office back when Elaine Kagan was SG (which explains why she took no part in the cert decision) can be found [here](#).

The PatentlyO post compares this case to the earlier one in which the Supreme Court decided that the 20 year extension of copyright’s term in the US was constitutional. I think the relationship between these two cases needs to be explicated a bit. The case about the copyright term, *Eldred v. Ashcroft*, was decided, at least in part, on the grounds that the Copyright Term Extension Act did not alter “the traditional contours” of copyright. When the courts face a challenge to a law based on Constitutional grounds, one of the major decisions they make is what “level of scrutiny” to apply to that law. For example, a law that tried to regulate speech based on its content — forbidding expressions of support for the Tea Party, for example — would get the strictest scrutiny. No law has ever survived this kind of analysis in the Supreme Court. In *Eldred*, the Court decided that copyright law *per se* was not in conflict with free speech principles and so an extension of its term by a finite number of years would be evaluated on the basis of an ordinary level of scrutiny. The Court said, however, that it would apply much more rigor if it were assessing a law that altered the “traditional contours” of copyright.

In the URAA, plaintiffs believe they have found such a law, since re-protecting works that had previously been in the public domain seems like a dramatic break with the past for US copyright law. So this case relies on the *Eldred* decision precisely because the plaintiffs believe that it presents the situation the Court worried about, but did not find, in *Eldred*. Where the CTEA was found constitutional in *Eldred*, the plaintiffs hope the Court will apply the same standard to find the URAA unconstitutional in *Golan*.

The URAA basically said that if a foreign work had risen into the public domain in the US only because of its failure to comply with the formalities that the US used to impose for obtaining copyright protection — notice and registration — it would be restored to protection as long as it was still protected in its country of origin. As a principle this sounds fair (if you accept that formalities should have been abolished), but in practice it has had some serious consequences for those who had been using those putative public domain works. Lawrence Golan, for example, is a symphony conductor who has suddenly found that he must get permission to perform the works of Igor Stravinsky when, in the past,

he did not have that added expense. The Court is asked to decide whether this is such a radical change to U.S. copyright law that it conflicts with the First Amendment.

One of the best resources I know of to understand the difficulties that these “restored” copyrights can create is [this article](#) by Peter Hirtle of Cornell University, which shows how difficult it can be to determine for sure whether a work really is in the public domain in the US because of the possibility of restoration. Often, potential users are simply unable to find the full information they would need to decide for sure if they can use or reuse a specific work. Presumably the Supreme Court will tell us, sometime next year, whether this uncertainty has changed the copyright game so radically that it now threatens our constitutional commitment to free speech.

# GBS and GSU: two cases, going forward

*Wed, 23 Mar 2011 08:19:15, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries, category: scholarly-publishing]*

The last week has seen two important decisions in copyright cases with significant interest for higher education. The first, of course, is the [rejection of the amended settlement in the Google Books case](#); that decision has gotten [lots of attention](#), so instead of rehashing it I want to suggest what I think the future holds in that dispute. Much less attention was paid to an order in the Georgia State case over alleged copyright infringement in providing digital readings to students, about which more in a bit.

The rejection of the Google Books settlement is pretty comprehensive. To my mind, the core of Judge Denny Chin's reasoning is that the massive licensing mechanism that would be created to allow Google to proceed with marketing a digital books database is simply beyond the power of the courts. He argues both that it is outside the scope of the issue originally presented in the case, and thus inappropriate for a settlement ruling, and that the mechanism itself is something that Congress, not the courts, has the prerogative to create.

Given the sweep of the rejection, and especially its finding that the "forwarding looking business model" is outside of the authority of the federal courts, this seems like a difficult decision to appeal. Nevertheless, I believe that it will be appealed, because I think the parties have very little choice. The other key part of Judge Chin's decision, to me, is his strong suggestion that the settlement be converted to an opt-in agreement rather than an opt-out one. This would destroy its attraction to both sides, I believe, since it would exclude the ability to exploit orphan works. Without that huge financial opportunity, I don't think settlement is worth it to either party.

Aside from reforming the settlement agreement in this way so that it could be approved by Judge Chin, the parties have two other options — continue the original litigation or appeal the rejection of the settlement as it stands. The first option seems unattractive to both parties at this point. Both would risk losing, of course, but more to the point, neither would have much to gain, at least not in comparison to the huge profit opportunity they think they have found in settlement. So I believe both sides will resist either returning to the original issue or reformulating the agreement in the way the Judge suggests and will instead appeal his decision, hoping to preserve that agreement more or less as it stands.

One interesting area of speculation is about what impact Judge Chin's elevation to the Second Circuit Court of Appeals will have on the case as it proceeds. If the parties went back to the district court for trial, a new judge would presumably be assigned. If they appeal, as I expect, a panel of the Second Circuit that does not include Judge Chin will hear the case. But will an appellate panel be less willing to overturn a decision made by their new colleague? Personally, I don't think that would be a significant factor, since I would expect this clear and carefully reasoned decision to be upheld on its own merits.

If more litigation is in the future for Google Books, that is even more certainly the case in the Georgia State dispute. Last Thursday Judge Orinda Evans [issued an order](#) denying the motion to dismiss made by GSU on sovereign immunity grounds and setting a date — May 16 — for a trial.

The motion to dismiss made by Georgia State raised the issue that federal courts (which are courts of limited jurisdiction; they can hear only certain types of cases) usually are not allowed to hear cases against state governmental entities. This case is based on a "loophole" in that rule that allows a plaintiff



to sue a government official in his or her official capacity in order to stop an ongoing violation of federal law. This loophole has generally been applied to prevent state violations of civil rights, but here the issue is copyright infringement. The issue GSU raised was the degree of control that the named officials, who include all of the Georgia Board of Regents and the President of GSU, actually have over the actions that are alleged to be infringing.

One of the established principles in the type of case I have been describing is that there must be a “nexus of control” such that an injunction in the case (damages are not allowed) can actually lead to an effective remedy. Courts hate to issue ineffective orders, so they will not allow me, for example, to sue the Governor of North Carolina if the DMV suspends my drivers license because the Governor has limited influence over day-to-day decisions at DMV. This issue of whether or not the defendants are close enough to the alleged illegality to actually control it is normally considered a purely legal matter that can be decided by a judge without trial. But in this case, Judge Evans has essentially postponed her decision about sovereign immunity until she hears all the facts at trial; in legalese, she is treating the question as a “mixed” issue of law and fact. She will thus decide at trial if that nexus of control exists. If it does not, she will dismiss the case on the grounds that she was never authorized to hear it. If there is sufficient control for her to decide the case, however, she will then rule on whether or not the alleged infringements were, in fact fair use. If she finds for fair use, she will not issue an injunction because there would be no reasonable suspicion of ongoing infringements that she would need to remedy.

It is clear that Judge Evans is ready for a trial after almost three years of maneuvering in this case; she has set a trial date less than 60 days from now. There has been extensive discovery, so the parties ought to also be ready for trial. All that remains open to question is whether both parties actually want a trial, or if the imminent prospect of one will push them to seek a settlement. Since I have already indulged in so much speculation this morning, I will add my personal observation that neither side has shown much interest in a settlement of the case thus far, and I think both will opt to go to trial. Both sides, I think, believe strongly in the principles they each think they are defending, and it is difficult to imagine what the middle ground would be upon which they could agree. So I will set aside May 16, fully expecting to hear news from the long-awaited trial of [\*Cambridge University Press v. Patton, et al.\*](#)

# Piling on

*Sat, 26 Mar 2011 13:17:09, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: technologies]*

Since posting my comments on the Google Book Settlement earlier this week, I have followed other commentary as closely as time has allowed. I have been interested to see that no one else whose comments I have seen seems to think that an appeal is likely. Indeed, I draw that conclusion entirely from the absolute silence I find about that option, while there is much discussion of other possibilities.

I imagine the reason for this is the strong sense that the rejection was, as Prof. Pamela Samuelson puts it in [this interview](#), the only conceivable ruling that the judge could have made and that it is quite water-tight from a legal perspective. While it is not unheard of for parties to spend lots of money on lost causes, the majority of commentators obviously feel that Google, the Author's Guild and the Association of American Publishers will not throw good money after bad by filing an appeal.

I am perfectly willing to pile on to this bandwagon, abandon my speculation about an appeal, and think about what other options the rejection might open up. One theme that seems to be emerging is that a renewed emphasis on solving the orphan works problem is now called for; certainly that is reflected in [this article from the Chronicle of Higher Education](#). I absolutely agree that the rejection of the settlement should be a [call for librarians, especially, to re-engage](#) with the orphan works issue, and want to consider a little bit what form that re-engagement might take.

The Google Books Settlement gave librarians, copyright activists and even Congress a chance to sit back and assume that orphan works was being dealt with. Sure, we thought, there are millions of works that are still protected by copyright but for which no rights holder can be found; access to these works is a problem, but Google is going to solve it. Now we cannot look to Google for a solution, so it is worth revisiting what a sensible solution might look like.

I think we should consider the possibility that a legislative solution may not be either the most practical or the most desirable way to resolve the issue of access to orphan works. The orphan works bill that came closest to passing a few years ago was hardly ideal, since it would have created requirements both burdensome and vague for gaining a measure of extra protection from copyright liability. A good bill that really addresses the orphan works problem is probably both hard to conceive and unlikely to pass. So what alternatives short of a legislative solution might we consider?

The obvious answer is fair use, since most proposals for orphan works solutions would essentially codify a fair use analysis. Fair use, after all, is really an assessment of risk, since its goal is to reuse content in a way that wards off litigation. The Congressional proposals around orphan works would have simply reduced the damages available in defined situations, thus also having as a primary purpose the reduction of the risk of litigation. Careful thinking about projects like mass digitization of orphan works can accomplish the same goal by balancing analysis of the public domain, permissions where they are possible and needed, and a recognition that for truly orphan works, the fair use argument is much stronger since there is no market that can be harmed by the reuse.

When I say "truly" orphan works, I begin to hint at another element that might go in to an informal solution of the orphan works problem, the creation of rights registries to help locate copyright holders. [This article about a copyright database](#), or registry, being built in the European Union — called the

ARROW project — indicates that such an idea can garner support as a way to address the difficulty of orphans.

The Google Books Settlement, of course, envisioned the creation of a rights registry that would have helped a lot with the orphan works problem, but now we need to think about other, and perhaps less ambitious projects.

A registry would help because it would provide an easy (or easier) way to determine that a work is **not** an orphan. A search in a comprehensive registry could help a putative user find the rights holder to whom a permission request should be directed and, if no rights holder has registered, create a presumption that due diligence has been performed. As EU Commissioner Neelie Kroes puts it in the article, one search in ARROW should be all you should need to determine the copyright status of a cultural good in Europe.

When I suggest a less ambitious registry than ARROW or the Google Registry that was never born, I am thinking that there are certain kinds of cultural goods — photography is an obvious example — where there are unique problems in marking the work in a way that permits easy identification of the rights holder. A registry for photographs, especially as image-matching software becomes so impressively accurate, could help photographers protect their rights and give potential users a little more security when deciding to use a work believed to be orphaned.

I want to emphasize that I am not suggesting a re-introduction of formalities in the US, akin to copyright notice and registration with the Copyright Office, anymore than the EU database would be a formality. Instead, I am proposing a voluntary mechanism that would help rights holders protect their own interests, make permission requests easier, and increase the accuracy of determinations about real orphan works.

# The good side of a bad lawsuit

Thu, 31 Mar 2011 07:14:49, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

For those of us who believe that education and technological innovation require more space in the fair use analysis than courts usually recognize, there was an interesting decision recently that might be heartening if it were not so heavily dependent on the fact that the plaintiff in the case was so unsympathetic.

In this case, the unsympathetic plaintiff is called “Righthaven” and their business is to receive transfers of copyright in news articles (mostly from the *Las Vegas Review-Journal*) and then bring suits against Internet sites that reprint all or part of the stories. They ask for maximum damages at trial, but offer to settle cases for a few thousand dollars; thus they are supported primarily by people who pay up out of fear and to avoid the cost of putting on a defense. On March 18 a district court judge dismissed one of those lawsuits, holding that the reposting of the article in question was a fair use. The judge’s reasoning, as reported [here](#), [here](#) and [here](#), was especially interesting and reflects why it is good to get sued by a really obnoxious plaintiff.

First, the Judge applied an interesting twist on the transformative fair use analysis, finding that the use of the news story at issue by the defendant non-profit organization was not a market competitor with the newspaper where it was originally published. The Center for Intercultural Organizing, he found, did not serve the same market as the newspaper, so the fourth fair use factor favored a finding of fair use. This is an interesting conclusion, given that there was no “new work” created here but merely a re-posting of an entire article where it would more easily be found by those who care about the work the CIO does. While this thinking about the fourth fair use factor usually happens in the context of a new work like a parody or critical commentary that is clearly transformative, here the judge simply tries to divide the audience for a news story from that of a community organizing website. Would this kind of logic translate to the context of re-posting certain works for educational purposes? It might, but we must remain aware that the nature of this particular plaintiff really colored this decision.

The other unusual bit of reasoning in this case makes the “disliked plaintiff” effect quite clear. The judge talked a good deal about how *the rights holder* (Righthaven) was using the copyright, which is not usually part of the fair use analysis. Usually, the use inquiry focuses on how the defendant is using the work, but here the judge looked at how Righthaven was exploiting the copyright solely as a means for bringing lawsuits. Righthaven does not produce creative work nor support those who do; it simply sues, or threatens to sue, other entities. This use “exclusively for lawsuits” was a mark in favor of fair use, the judge seems to be saying, because finding otherwise would have a chilling effect on other fair uses. This is an extraordinary bit of reasoning — linked to, but conceptually separate from, a concern for a chilling effect on free speech — that represents a substantial departure from the usually fair use analysis.

I am not saying, by the way, that there is anything wrong with the judge’s approach here. Part of the message we can take from this case (apart from the value of being sued by a really bad plaintiff) is that fair use is deliberately open-ended and driven by specific circumstances. The fair use section of the copyright law explicitly makes the list of four factors non-exclusive, so judges are free to consider other things, including the good faith of both plaintiffs and defendants. The judge did that here, and I have no quarrel with his method or his conclusion. We need to learn from this case both that the fair use analysis is intended to uncover particular facts about a specific situation, and that it is not easy, because of that purpose, to translate one decision, for better or worse, into other circumstances.

# There's more to life than copyright

*Thu, 07 Apr 2011 11:35:31, ksmithl2@duke.edu, [category: authors-rights, category: scholarly-publishing, category: technologies]*

It is a hard lesson for me to learn, but there are other issues related to scholarly communications besides copyright. Today's news has focused attention on free speech issues for academics. Now we have talked about free speech as it is impacted by copyright, and some interesting examples of how copyright can be welded to censor disfavored speech can be found [here](#) and [here](#). But for a moment I want to focus on another aspect of free speech and scholarly communications on campuses.

Recently there has been a lot of interest in the scope of free speech rights for professors at public universities. In 2006 the Supreme Court handed down a decision called [Garcetti v. Cabellos](#) which held that a public employee (a District Attorney) was not entitled to First Amendment protection for his speech related to his position. In short, he could be fired because of things he said publicly that were related to his job. This caused a great deal of anxiety for academics at public university, since it seemed to provide a loophole to avoid the academic freedom that is so cherished, but fuzzily defined, on our campuses.

[Garcetti](#) was followed by a number of decisions that did apply its ruling to employees of public universities, which increased the concern and brought the American Association of University Professors into the discussion. One oddity of those decisions is that the opinion in [Garcetti](#) is itself skeptical about whether the ruling should be applied to academics.

Today comes news of a decision in the Fourth Circuit Court of Appeals, reported [here](#) and [here](#), that reverses this trend and asserts that [Garcetti](#) should not be applied to professors. In a dispute where a tenured associate professor claims to have been denied promotion over blog posts and newspaper columns he wrote expressing conservative, Christian-oriented viewpoints, the 4<sup>th</sup> Circuit held that such speech was protected by the First Amendment and that [Garcetti](#) did not mean that an academic could be punished for unpopular speech.

It is important to realize that this case was not decided by the ruling this week; it was remanded to District Court. The Appeals Court held that it was improper to dismiss the case because of [Garcetti](#) and the presumption that a public university professor's speech was not protected, but the university may still be able to prove that promotion was denied for a different, acceptable reason. Only if the professor shows that he was actually denied promotion because of what he wrote will there be a First Amendment problem. But I want to consider a couple of interesting (I hope) questions raised by the Appeals Court's decision.

First, if a public university professor's speech is protected, as we always thought before [Garcetti](#), how about his or her right NOT to speak? The flap going on in Wisconsin over a public records request to see the e-mails of a professor who has apparently taken a political stance unpopular with the current state government raises the issue of how far free speech should go to protect the decision to not speak, or not have one's speech disseminate beyond those for whom it was intended.

There is a fairly long history of the Supreme Court recognizing and upholding the right not to speak based on the First Amendment. Some of these are "ventriloquism" cases, where courts have held that the state cannot put words in someone's mouth by requiring them to say specific words, like the Pledge of Allegiance or a motto on a license plate. But there is also jurisprudence upholding a right to decide

how to distribute one's own speech. In fact, in [Harper & Row v. Nation Enterprises](#) the Supreme Court argued that copyright was congruent with free speech partly because it supports the right to not speak publicly until one decided to do so. Given the strong First Amendment rights for state-employed academics affirmed by the Fourth Circuit, finding a more complete negative right to determine if, when, and where protected personal communications are published is entirely plausible. We shall see if that reasoning has an impact in Wisconsin.

Another point that is raised by this decision on academic free speech is who it applies to. Does it apply only to faculty, including, presumably, librarians with faculty status? Or could it apply to librarians and other staff as well? One of the effects of the technological revolutions we have seen lately is that many more of us — include yours truly — are able to communicate widely and advocate for policies and legal interpretations that may be controversial. It is interesting that the professor's scholarship that was at issue in the 4<sup>th</sup> Circuit was in non-traditional forms like blogs and newspaper columns. The shift in scholarly communications, and libraries' more deep involvement in scholarly communications issues, raises the question of academic freedom protections for non-faculty and the scope of free speech rights in this newly developing dialog.

# Retractions and the risk of moral panic

Fri, 15 Apr 2011 11:53:31, ksmithl2@duke.edu, [category: scholarly-publishing, category: technologies]

Several people sent me a link to this [story from the Chronicle of Higher Education reporting on a study](#) that finds that biomedical researchers continue to cite and rely on published articles even after the papers have been retracted. My initial reaction was what I presume it was supposed to be — “Gee, that’s terrible.” The conclusion that the article attributes to the study’s author is that, at worst, some researchers cite articles they have not read, and that, at least, researchers are getting to papers through informal routes that bypass the “official” websites where retractions are generally noted.

This article, however, prompted me to remember an earlier blog post and to explore a web site dedicated to publicizing retractions. The result is that I want to qualify the potential for a “moral panic” based on this study in two ways.

The first is to remind us all that the Internet is not to blame for the problem of bad science living on in spite of retractions. It is certainly true that the digital environment has led to more copies of a work circulating, and those copies can be very persistent. But printed copies of erroneous studies were and remain much harder to change or stamp with a notice than digital ones are. In the “old days,” a retraction would be printed several issues after the original article, where many researchers would never see it. Indeed, it is hard to imagine that a study like the one reported by the *Chronicle* could even be done in that environment; in most cases it was simply impossible to know (at least for the non-specialist) if an article was citing a prior work that had been discredited. Today more copies persist, but it is easier to disseminate news of a retraction.

The blog post I remembered about this topic was [by Phil Davis on the Scholarly Kitchen blog](#). In spite of the post’s unfortunate title, Davis does an excellent job of describing this problem without simply foisting the blame on the Internet and the increased availability it facilitates. He does suggest that the tendency to cite retracted articles is exacerbated by article repositories, and I would add that that we must balance whatever potential harm there is in these repositories with the great benefits to scientific research that are offered by improved access. More important, however, is Davis’ discussion of a potential solution to the problem, a service called CrossMark which could help address the “version” issue.

The other blog site that I explored for some insight into the retraction problem is “[Retraction Watch](#),” which is mentioned in the *Chronicle* report. What was most interesting about this site, I thought, was its sophisticated awareness of the variety of reasons for retraction and its recognition that not all retractions indicate that an article’s conclusions are unsound.

When we hear that an article has been retracted, we immediately suspect, I think, that there has been fraud, fabrication or falsification. At the very least we suspect that the authors have discovered that their results cannot be verified or reproduced. Often this is true, but there are other reasons for retraction as well.

One possible reason for retracting a paper is that it was sloppily presented, even if accurate. That seems to have happened in regard to a [paper by Stanford scientists that was retracted](#) by the *Journal of the American Chemical Society*. The authors agreed to the retraction, apparently, because of “inconsistencies” in the documentation and interpretation of the data, but have subsequently verified the fundamental finding that the paper reported. And some retractions are even less grounded in

fundamental scientific errors; retractions have occurred because of political pressure (such as with the conflicting studies about the effect of gun ownership on crime), or even because some people thought an article was in bad taste (Retraction Watch reports [here](#) on such a case).

What I like about Retraction Watch is that it looks seriously at the different reasons for retractions and, when they are not clearly explained, as in [this retraction](#) from the journal *Cell*, tries to dig deeper to discover what the flaw actually was, or was perceived to be. This should be a model for our general reaction to retractions and the news that retracted articles continue to be cited. We should ask the “why” question over and over while remembering that scholarly communications is a complex system with many layers; simple answers and moral condemnation in advance of specific facts are almost never helpful.



# Getting the whole picture

*Mon, 18 Apr 2011 11:04:33, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: user-generated-content]*

There has been a lot of attention paid to YouTube's announcement of its "Copyright School," which those accused of infringement will be forced to attend online. YouTube, of course, is trying to fend off more litigation, but that should not be an excuse for misrepresenting copyright law, as the [new video that is part of the "school"](#) does.

The video features animated characters who are identified as the "Happy Tree Friends." The focus of the video is on Russell, who is dressed as a pirate from the beginning of the video. This is one of the favorite themes of the content industry, and YouTube is clearly simply doing what they are told to do in designing their "school" this way. We have [written before](#) about why the pirate analogy is legally flawed. But it is also pretty stupid to use it in this context, since studies have indicated that it does not have the desired effect on the target audience, who think of pirates, at least as portrayed here, as rather romantic and exciting. Perhaps the myopic executives in the content industries, who are obviously calling the tune for YouTube, think this is a devastating critique, but the users of YouTube probably do not.

Other flaws are equally evident. The video threatens users with a "three-strikes" policy where three accusations of infringement can get a user "banned for life." This is entirely a voluntary policy by YouTube, since attempts to write it in to US law have so far not succeeded. The problem, of course, is that there are so many inaccurate accusations of infringement, and a three-strikes policy completely avoids the due process that is supposed to be afforded to those accused of the tort of copyright infringement. Three strikes works as if an accusation is the same as a judgment of guilt, which it decidedly is not.

If this were not enough to show that YouTube is uninterested in being fair or accurate, their appalling treatment of fair use clinches the matter. Fair use is mentioned in a quick discussion of mash-ups, but the description of fair use is done in a sped-up voice intended to convey that this is legalese which the viewer cannot possibly understand. The clear message is that fair use is too complicated for ordinary users to even consider. The Russell character is literally crushed by the weight of the fair use screen which, interestingly, seems to be an industry written text, not the actual text of section 107 of the copyright law. It ends by recommending that one consult a lawyer whenever there is doubt. Since fair use is designed to be a balancing test rather than a bright-line rule, there is always an element of doubt, so this qualification swallows the rule. Case closed on fair use.

The video also discusses the notice and takedown provisions of the law. What is interesting is that there is no mention of the potential misuse of takedown notices, which is, in fact, a substantial problem. The discussion of misuse takes place only in regard to the counter-notification process, which users can employ if their work is taken down wrongfully. Here there is a stern warning against misuse, although there is little evidence that this part of the law is regularly abused, and the viewer is left with the idea that counter-notification is too risky to be used. Just do what the content owners tell you and be thankful you are not in jail.

If YouTube really wanted to present a balanced view of copyright, at the very least they should balance the Happy Tree Friends travesty with [this humorous video that more accurately describes the use of the counter notification process](#) to challenge a wrongful takedown notice.

Should any reminder that the takedown process can be abused, and that the counter-notification provisions are a necessary part of copyright law, be needed, [this blog post about how some doctors abuse the process to get medical websites to remove critical evaluations](#) provides it. What is interesting is that the weapons of choice against web criticism of specific doctors are copyright claims, rather than defamation law. If the criticism that is targeted is genuinely untrue, libel law seems like the appropriate way to fight it. But it is so much easier to send a copyright infringement takedown notice, and the use of the counter-notification process is so sporadic, that this part of copyright provides a shortcut to silencing criticism that avoids having to prove that what was said was untrue or caused harm.

Because copyright infringement claims are so easy to abuse in the service of suppressing protected speech, it is truly appalling that YouTube, which many think of as a tool to empower free expression, has chosen to present such a one-sided and slanted picture of the law.

Update — if you just can't get enough really bad copyright videos, check out [this copyright PSA](#), apparently created by a teacher using her elementary students. Not only does it get the law wrong, but it is genuinely creepy as the children chant dubious answers to copyright questions in unison.

# Double talk

*Thu, 21 Apr 2011 10:08:16, ksmithl2@duke.edu, [category: authors-rights, category: libraries, category: scholarly-publishing]*

For almost two years now a small group of lawyers and repository managers in the U.S. have been discussing and drafting model language that libraries can use to insert in vendor contracts with publishers that will ensure the self-archiving rights of faculty at the specific institution who publish in the journals that are part of the licensed collection. The model language, and a considerable amount of background information can be [found on this blog](#). A similar effort has been underway at JISC, the Joint Information Services Committee in the U.K., for which [information can be found here](#).

Obviously these efforts have struck a nerve, because yesterday the International Association of Scientific, Technical and Medical Publishers issued a [statement opposing these efforts](#). The statement is a model of misdirection — affirming, in the best tradition of political double speak, exactly the values they think their opponents hold while trying to claim that it is merely the means, not the goal, that they oppose. It is worth taking a close look at this statement.

The STM statement makes four basic points, as follows:

1. “Conflating” authors rights with institutional content licenses would add complexity and uncertainty to the process.
2. Publishers are already doing well in terms of responsiveness to authors and in disseminating the results of research.
3. Scholars “value fora that provide comprehensive coverage of a discipline,” while institutions are pushing repositories in order to enhance their own reputations.
4. The impact of institutional repositories should be the subject of objective research and assessment.

The first of these arguments is really interesting, since it is publishers own policies that have driven institutions to adopt this strategy. Publishers often tell individual authors that they cannot accept authors’ rights addenda to individual publishing contracts because they need consistent agreements. Yet they have never been concerned that libraries must negotiate different agreements with each publisher when they are in their vendor roles. Now suddenly they want to avoid complexity, but only if it will serve to shut the other avenue toward authors’ rights. Can we expect a new willingness to accommodate individual authors who seek to self-archive? I don’t think so, especially after working with an author this week whose request to shorten the 18 month embargo imposed on self-archiving by his publisher was turned down flat.

This experience, and countless ones like it, convince me that the second point is simply not true. Responsiveness to author needs tend to stop at precisely the point where the author wants to take advantage of the new opportunities offer by the digital environment to increase his or her impact on her field. Impact on the field is a collective goal for publishers, but it comes right behind maximizing profit, and it does not including helping individual authors in any way that is perceived to threaten those profits.

The third point is a rather disingenuous attempt to drive a wedge between authors and the repositories on their campus, by characterizing the motives of each side so that they seem divergent. The use of the term “institution-centric repositories,” which seemed to have been coined specially for this statement, is indicative of the desire to put authors and their institutions at odds. In fact, authors really do want maximum impact for their work, and institutions are not just seeking a “showcase” with their repositories. When my institution adopted an open access policy, in fact, the most compelling argument for both the faculty council and the administration turned out to be “knowledge in the service of society,” which is one of Duke’s overarching strategic emphases. Both groups recognized that traditional toll-access publication was not serving this shared goal very well.

Finally, the impact of open access repositories has been subject to a great deal of research already. Most of it has supported the values that are behind the effort, and these publishers don’t like such conclusions. Thus the implication that they are the only ones capable of carrying out “objective” research and the reference to a project which is being lead by the STM Association itself.

All in all, this statement provides a model of partisan double speak, but it does little to forward the conversation. Licensing negotiations are one of the few places where institutions wield real power, the power of the purse, in their relationship with publishers. It is, therefore, a very appropriate venue to pursue the goals that are shared between faculty authors and their institutions. Such negotiations may be complex, but they always have been. What is new is that institutions are beginning to stand up for their own shared values.

# On the fair use rollercoaster

Tue, 26 Apr 2011 14:46:28, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

This is one of those weeks with lots of ups and downs. Recent decisions and issues about fair use take us on a roller coaster ride, I am afraid, as we find both good news and bad in the reports.

The case brought by Righthaven in which the judge indicated that he would find that the re-posting of an entire newspaper article constituted fair use has now resulted in a formal opinion; there is a [story, with a link to the full decision, here](#). As I [wrote earlier](#) about this case, the principal reason for finding fair use seems to have been that the plaintiff, Righthaven, was so unsympathetic. As expected, the decision puts considerable weight on the fact that Righthaven was using the copyright only to bring, or threaten, lawsuits. It is unusual for a decision about fair use to focus so much on the plaintiff's behavior, rather than that of the defendant, but it is good to see a concern for the "chilling effect" that copyright infringement claims can have being acknowledged by the court.

What is more gratifying about this ruling, however, is its attention to the purpose of copyright law, and its attempt to place copyright in that context. Judge James Mahan finds in this case that denying fair use and upholding Righthaven's lawsuit would do "nothing to promote the Copyright Act's purpose of promoting artistic creation." Exactly. And if more judges started with why we have a copyright law in the first place, fair use would get a better hearing.

To see a negative example of how important it is to consider the reasons behind copyright protection, we need only look at the decision denying fair use for the "appropriation art" of Richard Prince and granting summary judgement to photographer Patrick Cariou on his infringement claim. This decision rejects the idea that appropriation art can be fair use, and it threatens to have an especially chilling effect on galleries, since it holds that Prince's gallery shares liability for not having ensured that Prince's work was non-infringing before offering it for sale. There are reports about this frightening decision [here](#), [here](#) and [here](#). As the last of these stories notes prominently, this ruling includes the order that the offending artwork be destroyed! Here, I think, we can see why over-enforcement of copyright can pose a real threat to cultural productivity and why it is so important to look at each case through the prism of the original intent behind the law.

The Prince/Cariou decision was made by Judge Deborah Batts of the Southern District of New York. I have criticized Judge Batts before for her willingness to suppress cultural productions, including the sequel to *Catcher in the Rye*, in the name of an exaggerated view of the control that copyright grants. Judge Batts, I believe, is much too willing to simply outlaw certain imaginative creations when she thinks they are too dependent on a previous work. She does not, in my opinion, consider carefully enough the overall purpose of protection, its limitations, which stem from that purpose, or the possibility of less draconian remedies for genuine infringement.

One reason for this problem may be an excessively restricted view of the role of "transformation" in considering fair use. The term, of course, is not used in the fair use provision of the law, but it was championed in a [1990 law review article by Pierre Laval](#) and used by the Supreme Court in the "[Oh Pretty Woman](#)" case. That case emphasized that parody was a transformative use, and Judge Batts seems fixated on that single kind of transformation, dismissing fair use in both the Salinger and the Prince cases because she does not see enough parody. In the one case I can find where Judge Batts did rule in favor of fair use, [reported here](#), the parodic element was clear. But Judge Leval clearly did not

intend his proposed “fair use standard” to be so narrowly cabined in, and his avowed intent was to find an analysis that took account of the intent of the law to support artistic creativity. If we use that purpose as a guide, the case against literary sequels and artistic appropriations cannot possibly be as clear-cut as Judge Batts thinks it is.

The last stop on this fair use roller-coaster is New Zealand, where a court is [considering an infringement claim brought over a phone book](#). I mention the case because it shows how rules that we take for granted in the U.S. are not necessarily shared in other jurisdictions. Our Supreme Court has held that the white pages of a phone book, at least, are not creative enough for protection, and explicitly [rejected the “sweat of the brow” theory](#), which holds that copyright protection may reward hard work, even when no creativity is involved. But protection for sweat of the brow is common in Britain, and it underlies the *sui generis* database protection which is the law in the European Community. So now a New Zealand court is facing a choice: uphold a copyright based on the idea that labor alone should earn protection, or consider the possibility that the role of copyright should be limited to serving as an incentive for creativity. It is this latter view that is supposed to be the law in the U.S., and we would be better served if our own courts kept it in mind, regardless of what the Kiwis decide.

# Copyright gets under your skin

Wed, 04 May 2011 13:22:02, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: user-generated-content]

I was considering a post about copyright in tattoos even before I read about a recent case. [This blog post](#) raises some interesting questions about who owns the rights in a tattoo, and trying to answer them seemed like an interesting exercise; a chance, at least, to review some basic concepts.

Then I read [these stories](#) about a threatened lawsuit over an upcoming movie and realized that the topic was more current than I had suspected. The case involves an apparent imitation of Mike Tyson's famous facial tattoo being used in the movie "Hangover II," and a lawsuit from the tattoo artist to enjoin release of the film. As one of the bloggers about the case says, it seems to just be an attempt to get a settlement out of Warner Bros. — perhaps a deserved settlement, one might add — but it reminds us that these are not trivial issues and are worth a few minutes of our attention.

The Tyson case, and the [lawsuit over a tattoo](#) on the arm of basketball player Rasheed Wallace back in 2005, raise the issue of who owns the rights in skin ink. The answer is a little bit complicated, since rights vest when original work is fixed in tangible form. Actually applying the tattoo is certainly fixation in tangible form, so the actual tattoo artist will often hold the rights. But sometimes a design may be done by someone else, often the "tattooee" him or her self, prior to the actual tattooing. If an original design is done on paper, then copied on to skin, the rights are likely held by the designer. But simply providing the surface on which the tattoo is applied is not sufficient for the person who wears it to claim rights in a tattoo.

One possibility about ownership that should be accounted for is work for hire. Here it is important to remember that simply paying for something does not make it work for hire. If a tattoo artist is a regular employee of a shop, the tattoo design may belong to the shop owner as a work for hire. But it will almost never belong to the person being tattooed just because they paid for it; an explicit agreement would be necessary for that.

Once we understand that the copyright in a tattoo is not always, or even usually, held by the wearer, the issue of remedies arises. The two cases involving athletes and their tattoos being shown on TV or in the movies seem straightforward as to remedies — the artists want to be paid for uses of their work. In the Wallace case there was a settlement that presumably gave the artist some money, and it seems likely that the same thing will happen regarding Tyson's facial tattoo. But it is important to realize that some copyright infringement remedies — such a destruction or confiscation of the offending item — will simply not be available to a rights holder even if the infringement is especially blatant. If the application of the law to this area of artist production seems bizarre, we ought to remember that courts usually have some measure of common sense, and realizing that some of the usual remedies for infringement will simply not be available goes a long way to reducing the sense of outrage.

Finally, that first blog post I linked to above raises the question of whether or not a person who has a tattoo in which the rights are held by someone else would be able (voluntarily!) to have the tattoo removed. The issue here is artists' moral right to not have their work destroyed without their consent. In the United States these rights are conferred by [section 106\(A\)](#) of the Copyright Act only on a limited group of visual artists, but there is no obvious reason why a tattoo artist would not be included in that group. Here again it is important to think about the kind of remedies a court might resort to. There is a specific provision in U.S. law that limits the right of a visual artist to prevent the removal of a work of art

that is incorporated into a building, so that where a building was being torn down, for example, the remedies for the artist are limited such that they cannot force the building to remain standing. One would hope that our courts would take this example and analogize it to the case where a tattoo wearer wants to be rid of a tattoo; it would seem inhumane to order a person to continue to wear a tattoo against their will, just as it would be to order someone to have a tattoo removed because of alleged infringement.

In the end, there is no reason in principle that ordinary copyright provisions should not apply to tattoos. But because tattoos are works of art on human flesh, courts would be compelled to take the medium into account in order to avoid offensive and inhumane results. The way to do this is to limit the remedies available to a tattoo artist whose work is infringed. While money damages could still be appropriate, as in the Tyson and Wallace cases, other types of remedies that might fundamentally threaten personal autonomy and well-being simply should never be considered.



# Old law and modern lawsuits

Thu, 12 May 2011 07:40:02, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

Champerty is one of those ancient and obscure legal concepts that date from the Middle Ages and just beg, in my opinion at least, to be investigated and explicated.

The basic problem that rules against champerty address is the buying and selling of legal claims. At it's most egregious, champerty involves someone making a frivolous claim, usually in tort, and selling that claim to a legal speculator. In this way the claimant gets a swift and certain profit, while the speculator steps in to gamble on a bigger return as a result of the lawsuit. The broadest definition of champerty is simply "maintaining a lawsuit in return for a financial interest in its outcome." (definition from Cohen & Schwarz, *Champerty and Claims Trading*, 11 Am. Bankr. Inst. L. Rev. 197, 197 (2003))

Over time the rules against champerty have evolved and often become subsumed into other kinds of regulation. The rules that limit lawyers' contingency fees are one example of the evolution of champerty prohibitions. The underlying ethical concern, which is that courts will be clogged with poorly-justified lawsuits simply to serve external and purely financial interests, spans a wide range of legal fields and activities.

I ran across the word, dimly remembered from law school, in a [motion to dismiss one of the lawsuits brought by Righthaven](#) over Internet reposting of news articles. It has come out recently that Righthaven appears not to hold any of the rights under copyright in some of these cases, having purchased nothing but the "right" to bring a lawsuit. Defendants have leapt at this evidence, claiming the cases should be dismissed as mere "sham and champerty." But it is not those copyright cases that I began to consider in the context of champerty; it is the lawsuit brought by publishers against Georgia State University over electronic reserves, which is being partially funded by the Copyright Clearance Center.

I want to be clear that this arrangement, where the Copyright Clearance Center bears some of the costs of prosecuting the litigation, is not precisely the kind of thing champerty rules were intended to prevent. In the GSU case, the rights holders are themselves the plaintiffs, and, since no damages are being sought, there can be no suggestion that CCC has purchased a stake in any recovery.

Nevertheless, and in spite of its own protestations, the CCC does have a financial stake in the outcome of the suit, which goes to trial in a few days. A ruling that narrows fair use even further than the interpretation of it that GSU and many other universities are already using would drive many more transactions to the CCC and greatly increase their revenue. Essentially, CCC is financing an aggressive marketing strategy by paying 50% of the litigation costs in this case. They did not buy a stake, but they certainly have a stake.

When the Association of Research Libraries wrote a letter to the CCC [expressing disappointment](#) over the decision to help underwrite the lawsuit, [CCC's reply](#) emphasized that no damages were being sought and maintained that their participation had the simple goal of "clarifying" fair use. This strikes me as disingenuous. There are more efficient ways to clarify fair use than litigation, and the CCC has a definite financial interest in the case even absent any request for damages. CCC's aim here is not to clarify fair use but to narrow it dramatically, to their direct and immediate profit.

As I have said, this is not champerty *per se*. But it does raise some of the same ethical issues that undergird the old prohibitions. Suppose, for example, that one of the reasons that this case has not settled is that the plaintiffs are not subject to the normal financial concerns that accompany litigation. With an interested and supportive “angel” absorbing half the costs, it may be a smart gamble for plaintiffs to move forward even with a weak case rather than negotiate and settle on a reasonable “clarification” of fair use.

When, in the footnote to an [earlier ruling](#), Judge Orinda Evans revealed (to many of us, for the first time) this financial arrangement between the plaintiffs and the CCC, it seemed the judge was somewhat uncomfortable with the situation. The more I think about, the more I believe she should be.

# Housekeeping

*Wed, 11 May 2011 04:20:49, ksmithl2@duke.edu, [category: uncategorized]*

I will be out of the country for a three week trip to Turkey starting May 17. I would not ordinarily impose this fact on my readers — although I am very excited about it — but for the fact that my departure date is May 17. As many of you know, the copyright infringement case against Georgia State University over electronic reserves is scheduled to go to trial on May 16. The coincidence of these dates means that this blog will not be the best place to get hot news about that case; indeed, many of you will probably know of the result well before I do.

For those seeking up-to-date information about that case and other copyright developments, I recommend the [ARL policy blog](#) and the [blog from the Copyright Advisory Office at Columbia](#) University. Many others, I hope, will also report on important developments, including the higher education press.

I plan to post one more comment about the GSU case in the coming days, then this space will be inactive until at least the second week of June.

# Who pays for copyright enforcement?

*Tue, 17 May 2011 09:42:03, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

From David Hansen, JD, Scholarly Communications intern at Duke University Libraries:

Kevin's last blog post on champerty got me thinking about another ancient legal doctrine, also dimly remembered from law school, which has some application to recent copyright cases: "adverse possession." Adverse possession is a common law doctrine, dating back over eight hundred years, that was developed to settle disputes over real property when one person had legal title to the land, but another actually possessed the property. Adverse possession works to give rights in the land to the possessor of the land if the original title holder has sufficiently failed to police and assert her rights over the property in question. Now sometimes referred to as "squatters rights," one of the underlying purposes of the doctrine is to force landowners with legal title to vigorously assert and defend their own property rights.

The doctrine illustrates a default rule of our legal system—that owners of private property should pay to police and enforce their own rights. There are, of course, exceptions (for example, publicly funded district attorneys are responsible for prosecuting crimes like robbery or "criminal trespass"), but publicly-funded enforcement has traditionally been reserved for the detection and prosecution of invasions that rise to the level of a crime. Absent an external public interest in enforcement, the assumption has been that exclusive rights in property—real property, personal property, or intellectual property—are only worth legal maintenance to the extent that the rights holder will bear the costs of enforcement.

Despite this assumption, copyright owners and their policymaker-supporters have recently made overtures toward public enforcement of these private rights. Just surveying the news of the last week we see enforcement costs borne by [foreign "enforcement units"](#) like the one operated by the Recording Industry Association of New Zealand and funded by the United States government, and by [Canadian Mounties](#) who are asked to police Montreal theaters for camcorder-toting moviegoers. Efforts like these are in line with more sweeping proposals, like the Anti-Counterfeiting Trade Agreement (ACTA), an international agreement which has been criticized on this blog for shifting ["lots of the costs of enforcing IP rights from the private industries that hold those rights to government agencies, funded by taxpayers."](#)

A more subtle brand of cost-shifting occurs, however, when those who assert copyright infringement attempt to shift liability from one private party to another. For example, CNET, owner of domain download.com, [is being sued](#) for providing access to peer-to-peer file sharing software such as LimeWire. Rather (or in addition to) holding liable users that host the infringing content themselves (a costly proposition because of the sheer number of users), or even LimeWire itself, rights holders are asking that CNET be held responsible because it hosted the software that enabled the infringing activity. The question of CNET's liability is really one of secondary liability—focusing on the issue of either how much control CNET has over users (a key issue in deciding if there is "vicarious liability" on the part of CNET), or whether CNET took steps that were intended to induce or "foster infringement" (an important part of a "contributory infringement" finding). By shifting liability to CNET, it and others like it may be forced to carefully monitor the types of software it offers and the potential applications of that software by users. The safe harbor of [Sony Corp. of America v. Universal City Studios, Inc.](#) (holding that the mere sale of VCRs and other copying devices is not sufficient grounds for contributory liability so long as those devices have other substantial non-infringing uses) would indicate that it is not the responsibility of

CNET to monitor user-application of the software it hosts. But cases that backtrack from that safe harbor—notably the [case against Grokster](#) (a peer-to-peer network) and the recent suit by [Viacomm against YouTube](#) (essentially alleging that the DMCA requires YouTube to actively monitor the copyright status of user-posted content)—have blurred the line of responsibility for vicarious or contributory liability.

In the university context the question of control or inducement becomes more difficult. For example, how much control can, or should, Georgia State University administrators exercise over the materials used for particular faculty member's course offerings? The liability of GSU in the current case has come to rest on whether GSU administrators and librarians have properly implemented the university's copyright policy with respect to its e-reserve offerings, a system over which the university certainly has some degree of control. But what if copyright decisions are made directly by faculty on entirely faculty-administered systems? If materials are posted on faculty-administered pages, does the university have a responsibility to police those sites for infringing content? Should it? Perhaps faculty members have an academic-freedom interest in making their own fair use determinations. Fair use, after all, has a knotty but ultimately complimentary relationship with the First Amendment right of free speech.

In the past, academic publishers quickly named universities and administrators as defendants in infringement suits, but publishers have been hesitant to name individual faculty members. Presumably this tactic is to avoid biting the hand that feeds them (what are academic publishers without the academics who write for them?), but placing sole responsibility on the university shifts, or at least hides, the costs of these suits. Faculty members remain largely unaware that the publishers to which they submit their work (in this case, Cambridge University Press, Oxford University Press, and Sage) are attacking the assertion of educational fair use of those very same works on college campuses.

A good litigation strategy would seem to dictate suing defendants who have deep pockets and who are unlikely to retaliate in a meaningful way. Plaintiffs may seek to place responsibility on the YouTubes and CNETs of the world because the alleged infringers—the users who are actually using peer-to-peer software—are too expensive or too difficult to pursue individually. Publishers, however, may seek to place sole responsibility on universities and their administrators because the other defendants—faculty members—are too dangerous to name in a lawsuit. While universities should obviously bear the risks and benefits of their own faculty members, we should be careful to monitor the extension of that responsibility to areas that truly do shift or hide the costs of enforcement.

# A nightmare scenario for higher education

*Fri, 13 May 2011 11:28:27, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

In anticipation of the trial starting on Monday in the copyright infringement case brought against Georgia State University by Cambridge, Oxford and Sage publishers, and partially financed by the Copyright Clearance Center, there has been a flurry of motions, mostly relating to the admission of various pieces of evidence. But amongst that deluge of paper is a truly frightening document, the [proposed injunction that the plaintiffs are requesting](#) if they win the case. I have always known that there was a lot a stake for higher education in this case, but the injunction the publishers want would be a nightmare scenario beyond even my most pessimistic imaginings.

First, if this injunction were adopted as proposed, it would enjoin everyone at Georgia State, including students, who would seem to largely lose their fair use rights by virtue of enrolling at GSU. It would apply to e-reserves, faculty web pages and any learning management systems in use or adopted in the future. It would make GSU responsible for every conceivable act of copying that took place on their campus. In short, administrators at Georgia State would have to look over the shoulders of each faculty member whenever they uploaded course material to an LMS or any other web page. Arguably, they would have to monitor student copying at copiers provided in their libraries, since GSU would be enjoined from “encouraging or facilitating” any copying, beyond a limit of about 4 pages, that was done without permission.

Not only would GSU have to micromanage each faculty member’s choices about how to teach every class, they would also have to give the plaintiff publishers access to all of the computer systems on campus so that they too could examine each professor’s decisions.

I can only imagine the angry reaction of faculty members if this requirement were actually imposed on our campuses; they might finally rebel against the exploitation they suffer from these “academic” publishers. In any case the order quite literally asks the impossible and was apparently written by people with no functional knowledge of how higher education actually works. The administrative costs alone would be staggering, not to mention the permission fees.

Permission fees are the real purpose here, of course. The goal is to drive more and more money to the Copyright Clearance Center, which is the only source of permission mentioned by name in the draft injunction. The way the injunction would accomplish this would be by entirely eliminating fair use for Georgia State.

There is absolutely no mention of fair use or section 107 of the copyright law in this proposed order. Instead, the coping that would be permitted without permission is entirely defined by the bright line rules of the [1976 Guidelines for Classroom Copying](#) (see pp 68-70). Actually, it is the guidelines PLUS an additional requirement that is being sought as the sole standard for non-permissive copying.

The guidelines’ rule on brevity would entirely circumscribe such copying if this injunction were granted. That rule permits a copy of only 10% or 1000 words of a prose work, whichever is less. Many schools that adopt 10% as a fair use standard will be shocked to find that, under this definition, that is often still too much to be acceptable, since the 1000 word limit will usually take over.

Also, the rule about cumulative effect — a limit on the total number of excerpts that can be made — would be enforced across the entire institution. Two classes could not use the same work without paying permission, and Georgia State would be responsible for making sure that no system across its campus was providing access to any more than two excerpts (for the whole campus and of no more than 1000 words each) by the same author.

Added to these rules from the Guidelines is a new restriction, that no more than 10% of the total reading for any particular class could be provided through non-permissive copying. The point of this rule is nakedly obvious. If a campus had the temerity to decide that it was going to follow the rules strictly (since the flexibility which is the point of fair use would be gone) and make sure that all of its class readings fell within the guidelines, they still would be unable to avoid paying permission fees. Ninety percent of each class's reading would be required, under this absurd order, to be provided through purchased works or copies for which permission fees were paid, *no matter how short the excerpts were*.

Not only would the minimum safe harbor for fair use that the guidelines say they are defining become a maximum — the sum total of fair use — but that maximum would be shrunk much further by this 10%/90% rule. The intentions of Congress in adopting fair use, including its clause about “multiple copies for classroom use,” would be mocked, gutted and discarded, at least for Georgia State.

I believe that compliance with this order, were the publishers to win their case and the Judge to adopt the proposed injunction, would be literally impossible. For one thing, the record keeping, monitoring and reporting requirements would cost more than any institution can afford, even if they were technically possible. Also, there is really no permission market that is broad and efficient enough to meet the demand that this order would create; the CCC might get what it paid for in underwriting the litigation if this order became the law for Georgia State, but they do not have the coverage, even with their Annual Campus License, to support this kind of regime if it were broadened to other campuses and other publishers. Yet you can be sure that if those things happen, all of our campuses would be pressured to adopt the “Georgia State model” in order to avoid litigation.

This proposed order, in short, represents a nightmare, a true dystopia, for higher education. We can only hope, I think, that Judge Evans is clear-sighted enough, and respectful enough of what Congress intended when it passed the 1976 Copyright Act, not to adopt this Orwellian proposal, even if she finds in favor of the plaintiffs. No judge likes to issue an order that cannot be obeyed, and this one would be so far outside the stated policies of the United States in its copyright law that an appellate court could, and likely would, overturn it purely on those grounds.

# A second front

*Thu, 09 Jun 2011 08:20:47, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: libraries]*

For obvious reasons there has been [a lot of attention](#) paid to the Georgia State copyright infringement case recently. In that litigation three academic publishers are asking a judge to fiercely restrict academic fair use in favor of a pay-per-use system that, in my opinion, disregards the expressed intent of Congress in the 1976 Copyright Act and is foreign to the purposes of that law. The trial was completed yesterday, and a decision from the judge can be expected over the summer. But in our justifiable anxiety about that case, we should not miss the fact that it is only one part of an overall strategy to undermine the educational exceptions to copyright; yesterday the publishing community opened a second front in their attack on education by issuing a [statement of principles](#) designed to hobble inter-library loan.

The statement is presented by the Association of Scientific, Technical and Medical Publishers, who have been carrying on a quiet campaign of intimidation regarding ILL, especially ILL between countries, for some time now. The statement of principles seems to have been prompted by a [series of documents issued by the Association of Research Libraries](#) that defend current ILL practices (full disclosure — I am one of the authors of a portion of this report). In response, the STM publishers propose a set of rules that would gut section 108, which authorizes ILL, and would once again channel more money to publishers without supporting the creation any new content.

The principles that the STM publishers propose would have several novel effects. First, they would forbid ILL across national borders without specific permission (paid, of course) from the publisher. Second, they would make digital delivery entirely the province of the publishers (for a fee, undoubtedly). Libraries would not be able to e-mail a journal article to a patron, even though nothing in the current law forbids such a practice. Third, it would impose a vague standard of “due diligence” — language not found in the law — on all document delivery for “private, non-commercial use.” Presumably this is the thin end of a wedge to attack all private research use for which permission fees are not paid. It is important to understand that such a standard would give the United States the most restrictive copyright law in the world, and it would do so without the intervention of Congress.

The only document delivery which the STM publish want to allow — and even this would seem to be subject to their new due diligence standard — is printed copies which patrons would be required to physically retrieve from the library.

Distance education students would be out of luck under these proposed principles, as would those who were trying to write doctoral dissertations while working in areas where a research library is not at hand. Once upon a time I was such a doctoral student, and I can testify that such a situation is untenable. But the needs of higher education simply are not the concern for these publishers; they want more money out of us, and they want it every time a scholarly work is used in any way. Never mind that our faculty members are the authors of these works; once the copyright is transferred to the publishers they see that as a resource they can exploit to the maximum regardless of the harmful effects that exploitation has on the very enterprise that supplies them with content.

Increasingly, this seems to be a war for survival. I understand that traditional publishers are getting more and more desperate as the digital revolution proceeds and they continue to dither about how to address it. But academic faculty members are the source of almost all the content these publishers publish, so this behavior is an extreme example of biting the hand that feeds them. It is even more



stupid, in my opinion, than the strategy of recording industry who is suing its own customers, because these publishers are attacking a group that is both their customers and those who supply them with a product in the first place.

As these attacks on higher education continue to escalate, it becomes increasingly clear that the economic viability of higher education, already in doubt by some, depends on rebelling against these traditional publishing practices. In the digital age it is simply not necessary to rely on these publishers, and they seem to be doing all they can to make it impossible as well. I wish I did not feel that I have to hope this apparently self-destructive behavior proves to be exactly that. But it must serve as wake-up call to academic authors that traditional practices are now being abused in a way that would make much academic practice impossible. Open access alternatives seem more and more to be not just a nice alternative, but the only path scholarly communications has left to survival.

# Open access, copyright wars and the Trojan horse

*Wed, 15 Jun 2011 08:22:18, ksmithl2@duke.edu, [category: authors-rights, category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

On our recent trip to Turkey, I happened to be wearing a [SPARC open access t-shirt](#) on the day we visited the site of ancient Troy, and my wife took a picture of me holding a model of the Trojan horse with the t-shirt. How one views the Trojan horse, of course, is a matter of perspective. To the Trojans it was a nasty trick, but to the Greeks it was a new way to gain access that had previously been denied.



I bring this up because of the coincidence with the [forum on the Georgia State copyright case](#) that was published in the Chronicle of Higher Education, also while we were in Turkey. A number of the participants, myself included, suggest that the open access movement is the way to respond to aggressive copyright enforcement in the scholarly publishing industry. It is worth considering the various ways in which open access is a Trojan horse solution for scholarly communications — the movement that launched a thousand journals and burnt the topless towers of Elsevier, so to speak.

Last week the Duke University Libraries [announced the launch](#) of its first library-sponsored open access journals on the Open Journal System platform. Both of these small journals — one a long-standing publication and the other a new, international collaboration — are edited by Duke faculty members and are fully peer-reviewed. The OJS system automates many of the administrative tasks of the journals, adding greater efficiency to the volunteer editorial labor that has always been the core of scholarly journal production. For authors who publish in these journals, the two great difficulties in scholarly communication — copyright management and access to the greatest number of readers — are solved; authors retain their copyrights and are free to do with their articles whatever they believe serves their needs and interests best, while potential readers have unfettered access. The Libraries bear the small cost of administering the technology as a service to Duke and to the wider community of scholars.

These journals add to a series of efforts toward open access made by the Duke Libraries and the Duke faculty. In 2010 the faculty adopted an [Open Access policy](#) to facilitate greater “reach for their research” and to provide access to those who cannot, for various reasons, rely on the traditional model of restricted, subscription-based access. The Libraries have been developing the DukeSpace repository

in order to make the vision expressed by the faculty in that policy into a reality. Last fall, Duke also [implemented a COPE Fund](#) (Compact for Open access Publishing Equity) designed to help authors pay article processing fees if they decide that publishing in an “author-pays” open access journal is the best choice for them. The COPE fund is a joint project underwritten by the Libraries and the Provost’s Office; it has seen steady, but not overwhelming, requests for assistance from faculty authors.

We are proud of these initiatives at Duke, but we recognize that none of them are unique. Many institutions are adopting some or all of the same strategies. The point is that these efforts really do remove the conflicts about which so much has been written in the past few days (much of it by me). Insofar as I have suggested nightmare scenarios, open access avoids them all. If scholarly authors insist on retaining their copyrights, even when they publish in traditional journals, the problem of having that copyright enforced against the scholars’ own interests simply does not arise. If they retain rights to post in an open access repository, the access problems, whether they involve electronic reserves, faculty posting in a course management system, or inter-library loan, simply do not arise. And if more scholarly articles are just published directly as open access works, either in free open access journals like the ones the Duke Libraries have just launched, or in an author-pays journal with the support of a COPE fund, these problems once again simply do not arise.

Is open access a Trojan horse? Not really. The Trojan horse was meant to deceive, while the open access movement has always been honest and up-front about its goals. But it is still true that traditional publishers have proved, through a series of actions designed to increase their own revenues at the expense of higher education, to be poor stewards of the copyrights and the scholarship that we have long entrusted to them. The [metaphor of a war](#) has, unfortunately, begun to surface in the debate. But there are also articles like this one, in which a researcher points in a more irenic direction, suggesting that [open access is the future of scholarly publishing](#). The variety of open access mechanisms that are being initiated now, and the yet-unknown ones that will be [tried in the future](#), offer an opportunity to cut short the war and put the management of scholarship into the hands that can best serve the overall interests of research and teaching, those of the scholarly authors themselves.

# COPE, Renewed

*Thu, 30 Jun 2011 09:10:16, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Duke University announced its COPE fund in October of 2010. COPE, which abbreviates the Compact for Open Access Publishing Equity, is a movement for colleges and universities, mostly through their libraries, to provide financial support, usually reimbursement, for the article processing fees that some open access journals charge. The basic idea is to see to it that these article processing fees do not pose an obstacle for faculty who want to publish in an OA journal. In this, as in all aspects of scholarly communications work at Duke and elsewhere, I believe, the goal is to help preserve as much choice and as many viable options for faculty authors as possible.

Duke's fiscal year ends in June, so it was time recently for the Libraries to decide whether and how to renew our commitment to COPE. The original COPE fund was created with money from the Libraries and from the Provost's office, and since October we have had 13 requests for reimbursement of article processing fees. Of those requests, eight met the criteria we had established and either were funded or will be shortly. These requests did not exhaust the fund we had for FY '11, but they have been accelerating over time, and we anticipate robust demand in the coming FY '12.

So part of the good news to report is just that COPE funding will continue to be available for FY '12 for Duke authors who decide to publish in fully open access journals. This is a decision we want our authors to be able to make without concern about fees, and a business model for publishing that we want to support. But what makes this coming year different, and somewhat unique, I believe, is that the COPE fund in 2012 will be a three-way partnership, with funds coming from the Libraries, the Provost's Office and the Dean of the School of Medicine. A quick survey of colleague institutions who have COPE funds did not find any where monies were contributed by the medical school, so we have reason to believe this is not the norm.

About half of Duke's COPE applications so far have come from medical faculty, so it is very gratifying that the Dean of the School of Medicine has agreed to contribute to the fund. Open access is growing in most fields, but especially in the biomedical sciences, where access to research and speed of publication are vitally important. So the increase in the fund and the collaboration amongst the interested parties at Duke makes especially good sense.

One point that has been important as we renewed the COPE fund, and involved the School of Medicine, has been the relationship with grant funding. Since grant funds are so important to medical research, and many medical research funders allow grant money to be used to pay open access charges, it seemed important not to undermine the support for OA from this quarter and to make COPE funds available where they are most needed. The principle adopted at Duke and many other COPE institutions is that the funding is only be available to researchers whose work either is not grant funded or whose funder does not allow the use of grant money to pay OA fees. COPE funds are all about incentives, and preserving the incentive for grantors to support open access was an especially important aspect the policy for the medical school.

We are looking forward to a busy year supporting open access publication at Duke, and very proud of the partnership that has formed for that purpose between the Libraries, the Provost, and the Medical School.

# What a mess!

*Thu, 07 Jul 2011 11:10:23, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Recently my intern Dave Hansen (another lawyer) and I have been looking at the new author self-archiving policies promulgated by the American Chemical Society and Elsevier. It would be more accurate to say that these policies are anti-archiving; in spite of persistent rhetoric about how committed these publishers are to access to scholarship, the clear intent is to restrict and interfere with decisions faculty authors might make about how best to serve their own interests as scholars.

A comical element was introduced into our consideration early on, when we realized that the two different policies imposed directly opposite requirements for self-archiving. The [ACS](#) only allows an author to self-archive their final manuscript if doing so is mandated by her institution, while [Elsevier](#) only allows it if it is not. So on each campus the policies must be evaluated and one publisher or the other declared off limits.

In general these publishers' statements about author rights are confusing and self-contradictory. It seems clear that the intent of these statements, policies and contracts is not to clarify the authors' obligations so much as it is to confuse and intimidate them. At one point we asked ourselves why we were spending so much time poring over these badly drafted documents, and we realized that we were doing it because we are concerned not to let our faculty authors put themselves into difficult positions. What is clear is that these publishers have no such concern; they are trying to make authors pawns in their effort to dictate campus policies.

We have to start our evaluation of the position that Duke authors would be in, vis-à-vis these publishers, by asking ourselves what exactly the [Duke Open Access policy](#) is. From its inception we have maintained that it is not a mandate. Although the policy grants Duke a license to archive the works written by its faculty, there is no requirement or assertion that it will be universally exercised. The license is fully waivable and it was adopted with the commitment that its implementation would not involve Duke authors in conflicting obligations. What the policy most clearly represents is a strong statement that Duke authors want to make their own works as accessible as possible to the largest number of people.

So if this is what we think our policy is, how does it interact with the crazy quilt of rules imposed by these two publishers? Regarding the American Chemical Society, our conclusion was that Duke's policy is simply incompatible with publication in an ACS journal. ACS only allows an author to self-archive if there is an institutional or funder mandate that they do so, and Duke does not mandate such behavior. ACS authors are treated here with little consideration; their right to make individual decision about their own best interests is simply not respected. So we will communicate to our authors who write for ACS journals that they may not exercise the policy decision that they made 18 months ago because their scholarly society has told them not to. We will ask them to make their unhappiness with this interference with their freedom to determine academic policy known to the ACS.

Elsevier presents a more difficult case. There are multiple policy statements out there, and they are not particularly consistent. It is also not clear which statements will actually end up incorporated in author contracts. What is clear is that Elsevier wants to dictate what policies our faculty can and cannot adopt for itself, which certainly raises the issue of how willing authors will be to surrender the idea of academic freedom.

But our bottom line is that these statements are ineffective in changing our approach at Duke. In a [statement sent to the lib-license email list](#), Alicia Wise of Elsevier tried to explain the new policy by emphasizing that authors would still be able to voluntarily post their final author manuscripts. Only a “mandate” triggers the restriction on author self-posting, according to Ms. Wise. Although there is language in some of the Elsevier documents that suggests otherwise, we are inclined to take Ms. Wise at her word. Our policy is not a mandate, and author participation is entirely voluntary, especially since a final author’s manuscripts can only be obtain from authors on an individual “opt-in” basis. So we do not see a conflict here with the policy our faculty has put in place.

If Elsevier disagrees with our interpretation and thinks that Duke’s policy triggers their denial of authors’ rights to our faculty, they ask us to discuss the matter with them. This we would be happy to do, but we will do it as part of our negotiations to subscribe to their journal packages. In her email message Ms. Wise states, somewhat out of the blue, that “author rights agreements and subscription agreements should be kept separate.” On the contrary, we believe that subscription negotiations are the perfect time for a campus or consortium to take steps to protect its faculty and defend their right to make policy decisions for themselves. If Elsevier wants to interfere with that right, we will address that desire at the point when we are considering investing some of the Universities’ money with them, if only to get their attention.

# Unintentional felons?

*Tue, 12 Jul 2011 07:25:07, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

Whenever a new law is proposed in Congress, and especially when it deals with copyright, it behooves us to look both for the reasoning behind the bill and its potential for unintended impact on non-targeted activities.

Such a bill is [S 978, also known as the “10 Strikes” bill](#), which was introduced by Sens. Klobuchar, Cornyn and Coons and recently reported out of committee to the full Senate. The language of the bill amends both copyright law and the federal criminal statutes to turn ten or more public performances of a copyrighted work “by electronic means” — presumably unauthorized performances — into a felony punishable by up to five years in jail.

The purpose of this bill seems relatively obvious; it would further shift the expenses of copyright enforcement from the private companies that create content onto the taxpayer. Copyright is generally a private tort, and the copyright owner has the obligation to bring lawsuits against infringers in order to enforce its rights. By converting infringement into a federal crime, the costs of litigation would be borne by the government (the Justice Department) and, ultimately, by taxpayers. This has been a continuing theme of the lobbying efforts undertaken by “Big Content” in the past few years. During testimony in favor of this bill (and the PROTECT IP Act, a similar proposal to increase federal enforcement efforts) [a DOJ official told the Judiciary Committee](#) that there have already been 15 new attorneys and 51 FBI agents hired under the earlier PRO IP legislation. The introduction of these bills is an example of the continuing success of industry lobbying.

Copyright law has had some criminal provisions for quite a while, but the threshold for this felony is really quite low — only 10 unauthorized public performances within 180 days. So the expense of industry efforts to reign in YouTube, as well as less above-board media sharing sites, would dramatically shift to government lawyers instead of those employed by Disney or Comcast if this bill were adopted.

The intended consequences of this law are bad enough, at least for those who do not want to hand more tax money to the entertainment industries. But the unintended consequences could be worse. As the [blog TechDirt points out](#), this bill could create liability for folks who embed YouTube videos into their webpages or blogs. Others have suggested that online karaoke could also become a criminal act. Since it is public performances and not just reproduction that is criminalized here, some one who embeds a video (or even links to it?) would need to know in advance that the video was made available with authorization.

As the parenthetical question above indicates, the absence of a definition of what constitutes a public performance makes this law especially ill-conceived. And it is not even made explicit that only *unauthorized* public performances would trigger liability, although presumably this enforcement bill cannot by itself criminalize public performances that are not even infringing.

For higher education, it is useful to distinguish which performances might raise a problem if this bill were enacted and which ones would not. Performances in a live classroom are specifically authorized by the Copyright Act, so they would not have the potential for criminal liability. Film clips that are transmitted through a closed learning management system are similarly authorized (although with

several qualifications), so this common practice would not become criminal either. Nevertheless, the fact that we have to ask the question indicates how dangerous such thoughtless legislation can be.

Where risk would arise is in those many supplemental educational communication tools that faculty use to enrich their teaching. Embedding a video in a class blog might become problematic, as could having students make and share videos in which background music, even if incidental, was included. And a cynic might see behind this new effort to ratchet up penalties for infringement an attempt to frighten other universities away from following the example of UCLA in streaming digital video for classroom teaching; under this bill criminal charges might be possible if a fair use defense of that practice were rejected.

Another big question raised by this proposal is whether or not “accomplice” liability might attach to universities because of criminalized public performances initiated by students. Courts have apparently never accepted a criminal parallel to contributory infringement, but the Department of Homeland Security [asserted exactly that theory](#) when it began seizing the Internet domains of web sites that allegedly linked to pirated content.

With this “10 Strikes” bill it is easy to see why it is important, yet extremely rare, for Members of Congress to think before they “strike.”



# Brilliant!

*Fri, 15 Jul 2011 14:49:23, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-topics, category: scholarly-publishing]*

Two wonderful resources for academics thinking about public access and open access came to my attention recently, and I want to share them as widely as possible.

The first is this [video of a short speech](#) given to the 40th LIBER Annual conference in Barcelona by Neelie Kroes, the European Commissioner for the Digital Agenda. LIBER is the Association of European Research Libraries, and Ms. Kroes gave their keynote address at the end of last month.

In her four-minute speech Commissioner Kroes does two important things. First, she succinctly states the case for public access to government-funded research, including the data that underlies research. She provides a sterling example of a politician (she was in both the Dutch Parliament and its cabinet) who really understands the needs and difficulties of scholarly research, as well as the opportunities provided by the digital environment. The second important part of Commissioner Kroes' speech is her announcement that the European Commission will expand its public access mandate for funded research to include all research supported by the EC. Time for the U.S. to follow suit, if we do not want to lose ground in innovation and economic development.

The second brilliant resource I want to point is this [12 point explanation of the relationship between Open Access and Copyright](#) by Peter Suber. It is an unfortunate reality of my job that I am frequently reminded about how many misconceptions regarding copyright persist amongst scholars. Unfortunately, there are some who try to exploit the misunderstands to convince scholars that copyright is simply too complex for them to manage, and surrendering all their rights is the path of least resistance. Professor Suber's 12 points do a superb job of debunking some of the myths and clarifying that open access and copyright are not only perfectly compatible, but also that good copyright management can be a tremendous (and attainable) benefit to scholars.

# Careless language and poor analogies

*Thu, 21 Jul 2011 14:21:30, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: technologies]*

One of Will Rogers' best known aphorism is "I only know what I read in the papers." In line with Rogers' irony, if all one knows about [the Aaron Swartz case](#) is what one reads in the blogosphere, one knows very little indeed, and much of it wrong.

Swartz has been indicted on several federal charges after allegedly physically and technologically gaining unauthorized access to the MIT network and downloading a huge number of files from JSTOR. On that everyone agrees. After that the claims about and arguments based on this event diverge dramatically.

Predictably, many bloggers (an example is [this one from the Copyright Alliance](#)) call these actions by Swartz "theft" or "stealing." As always when talking about intellectual property, these words are misapplied. The formal definition of theft from Black's Law Dictionary is "the felonious taking and removing of another's personal property with the intent of depriving the true owner of it." It should be clear from this definition why we call authorized use of intellectual property "infringement" rather than theft. What Swartz is alleged to have done did not remove the intellectual property and showed no intent to deprive the original owner of it; he merely made, allegedly, unauthorized copies, which does not have the effect of depriving anyone else of intangible property. JSTOR was never without these files and they have, in fact, recovered the unauthorized copies.

Whenever someone uses the language of theft in reference to intellectual property, they are trying to cover the weakness of their argument, in my opinion. Let's just say infringement and talk about both the legitimate reasons to protect IP and the public policy that permits some unauthorized copying.

By the way, Swartz has not been charged with copyright infringement either. The charges of wire fraud, computer fraud and illegally obtaining information from a protected computer all relate to the hacking itself, not to the downloads.

Another place where serious misrepresentations abound is when we are told (as in [this post on the Scholarly Kitchen](#)) that Swartz has "done this before" because of a previous incident where he download large numbers of documents from PACER, a database used by the federal courts. That incident, however, involved neither illegal access nor copyright infringement. Although PACER usually charges a fee, Swartz used a computer at a university on which access was being provided for free as an experiment. And the materials he downloaded — documents from the federal courts — are not protected by any copyright due to [section 105 of the US copyright law](#). To be sure, Swartz was protesting the fees charged for access to works created at taxpayer expense for the public good, but his actions in that case have no analogy to the behavior charge in this indictment.

One place where there is significant disagreement is about Swartz's intentions. Many bloggers simply assume that he intended to release all of the downloaded files to the public, although Swartz claims he intended to do text-mining research with the articles. He has done such work before, so there is some plausibility to his claim, which may explain when infringement charges have not been brought. So turning this into [a debate about](#) the open access movement is wholly inappropriate. It is important to recognize that the victim of these alleged crimes was not JSTOR or any of the journals it aggregates. The victim was MIT.

However fervently one shares Swartz's goals for greater access to legal and scholarly information and publications, the actions for which he has been charged do not serve those goals. Quite frankly, Swartz's actions were not radical enough, in the sense that they did not get to the root of the problem. It is clear that the system of scholarly dissemination is badly broken, and simply hacking it does not change that fact. The real change, the real solution Swartz (apparently) seeks, will be found only when the academic authors, the original holders of copyright, stop transferring those copyrights to publishers without careful reflection and safeguards on their right to disseminate their own work widely.

# Why Can't I Digitize My (Institution's) Library?

Wed, 27 Jul 2011 07:47:48, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries, category: technologies]

By David Hansen, J.D., Scholarly Communications Intern

On Tuesday Judge Denny Chin set a deadline of mid-September for Google, the Authors Guild, and the AAP to work out a settlement for Google Books. The lawsuit, filed in 2005, seems to have been going on forever, and I wonder what, in the meantime, libraries can do to move forward. After looking at my own (personal) digital library, I wonder how the same principles regarding digitization might apply to institutional libraries.

Over the weekend I joined Google Music, a service that uploads my collection of music and stores it . . . somewhere. Somewhere in Google's cloud. With it, I can access my entire collection of music from any computer. It's great.

What is not great is my internet connection. I've had the service for about a week, and at this point only about half of my music collection is uploaded. Uploading large amounts of data understandably takes time, and since Google Music "store[s] a unique copy of Your Music on your behalf," each and every file has to be transferred. Uploading these copies is generally considered "space-shifting," which is something that [Google](#) —and the [courts](#)—have concluded is lawful "personal use."

Apparently there are other approaches to what Google Music does. *Ars Technica* has published [this article](#) outlining the legal positions of Google Music, Amazon Cloud Player, Apple's iCloud, and MP3Tunes. All three services provide online streamed copies of user's music collections. Apple does so with licenses from the record labels.

Google Music and Amazon Cloud Player both seem to operate as a "digital locker," making unique copies of the user's own files. They presumably rely on time-shifting cases that make users' actions lawful, and on the *Cartoon Network v. Cablevision* case (discussed at length in the *Ars* article) which held that Cablevision would not be directly liable for "publicly performing" the works in question, although it provided a DVR service that allowed users to record and retransmit their own unique copies of previously transmitted shows. The court in *Cartoon Network* placed some emphasis on the fact that each user only had access to their own personal and unique copies of the recorded shows.

MP3Tunes acts in a similar way, but with two differences: First, MP3Tunes will delete redundant copies when more than one user uploads identical files. This de-duplication process, while obviously more efficient than the Google and Amazon services, may conflict with the *Cartoon Network* case because each user accesses one centralized copy of their song, rather than multiple users accessing multiple 'unique' copies of their own recordings. The second major difference is that MP3Tunes is currently being sued by EMI. Most of the suit focuses on the safe harbor provisions of the DMCA, and whether MP3Tunes can be held liable directly, notwithstanding the *Cartoon Network* case cited above, for "publicly performing" the works in question. But another major issue is whether space-shifting to the cloud is a permissible fair use.

For libraries that want to make digital copies of their print collections—i.e., space shifting—there are some limited exceptions in the law that permit copying for preservation ([section 108](#) of the Copyright act). There is a need, however, to provide more complete digital access to the entire campus community beyond that which is contemplated by section 108. The University of Michigan (along with Florida, Illinois, and Wisconsin) has recently announced that it will be making available to campus users copies of orphan works, held jointly by the University of Michigan and HathiTrust, based on an assertion of fair use and its own risk analysis. The fair use argument relies on the idea that only works in each respective library's print collection will be made available online to their users through the HathiTrust; one print copy, one digital access. No one is gaining access to books they don't already own—just different, electronic access to those already in the print collection. The parallel to the 'digital locker' analogy that supports Google Music is strong, and the fair use argument for Michigan is bolstered even more by the fact that it isn't in it for the money (as Google is).

This fair use assertion makes an end-run around section 108, but looking at the fair use factors, it is still appealing. Even more so for Michigan because a large part of the scanned corpus of the HathiTrust comes from Michigan, so for many books it would also be able to make the argument that the digital copies are not just *practically* the same books that are in its collection, but that they are *identical* copies of UM books, meeting some of the concerns of the *Cartoon Network* court. Other libraries have less to rely on in that respect, as fewer (or none) of their physical copies were scanned for inclusion in the database. But the fact that Michigan and these other libraries are only making orphan works available means that even if the fair use analysis is slightly off, there is still almost no chance anyone will be sued. The orphan works identification process that Michigan has used (detailed [here](#)) employs a more than reasonably diligent search for copyright owners, and leaves little chance that there are any rights holders available or willing to bring an infringement suit.

Risk notwithstanding, though, I wonder, what's wrong with a library digitizing its *entire* collection (not just orphan works) under the space-shift theory? If the library takes those books out of circulation (perhaps in high-density storage) and limits online access to one user at a time (essentially, recreating the limitations of a physical visit to the library), the fair use analysis is still very much in the library's favor. Google, in its *amicus* brief in support of MP3Tunes, makes the point well:

"[j]ust as the Supreme Court has held that 'time-shifting'—recording television broadcasts for later viewing—is a lawful fair use, *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455 (1984), so too is 'space-shifting' lawfully acquired music onto digital music players or cloud-based equivalents, *Recording Indus. Assoc. of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1079 (9th Cir. 1999). A contrary holding would treat tens of millions of iPod owners who lawfully acquire their media as no better than those who misuse new technologies to pirate music and movies."

Should space-shifting books be any different? These cases, admittedly, deal with space- and time-shifting for personal uses, and not for uses of educational institutions. That distinction may be critical in the end. But shouldn't uses for "teaching . . . scholarship, or research" — which are specifically called out in the section of the copyright act that codifies fair use — carry at least as much weight as "personal use," which has no mention anywhere in the act?

Finally, if a library can digitize its own library and make it available to patrons, can that library pool its digital holdings with other libraries, so that there is no needless duplication of digital copies? Storing these works in digital format is not cheap, and while my meager 20GB music collection has taken a half a week to upload to GoogleMusic's "cloud", the creation and duplication of millions of volumes of digital

volumes is a monumental and inefficient task. Such a restriction, [as amici in the MP3Tunes case have argued](#), would be incredibly burdensome to both digital libraries and users in general.

# Licenses, prices, fair use and GSU

Wed, 03 Aug 2011 11:58:54, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: licensing]

When the trial of the Georgia State copyright infringement lawsuit closed last month, the Judge asked both sides to file post-trial briefs, outlining their proposals for findings of fact and conclusions of law that they think the court should make. They are extensive documents, representing the last chance each side has to make its arguments, and they are now available on the [Justia website](#) (docket numbers 409 through 411, with responsive arguments from each side at 414 and 415). More about these documents in just a moment.

Before these documents were filed, however, there was an interesting contrast set up by a couple of unrelated publications. First, Tom Allen of the Association of American Publishers (one of the groups paying the plaintiff's legal fees) published [an opinion piece in \*Publisher's Weekly\*](#) arguing that the Annual Academic Copyright License that the publishers say is a solution to the infringement they allege would only cost GSU \$114,000, or about \$3.75 per student (there are replies to this assertion [here](#) and [here](#)). Second, there was a [news story and much comment](#) about the price increase being imposed on Canadian universities for their copyright licenses from Access Copyright, which is going up from a few dollars per student to \$45/FTE. The juxtaposition of these stories prompted the question of why it was costing so much more in Canada to license copying of protected works.

I think there are two answers to the question of why the Canadian license costs so much more. The first is that the \$3.75/student number for the CCC license does not strike me as realistic; it is certainly much less than my university, with a smaller student body, was quoted. I suspect it is a "first year" discounted rate that would rise very quickly, which is the model we were presented with. But the more important reason for the difference is that the Canadian license is a compulsory one, created by the Copyright Board of Canada, and therefore comprehensive. Regardless of what you think about the price, when a university buys a license from Access Copyright, it covers pretty much all of the copying of educational material done on campus. By contrast, the Annual Academic Copyright License from the Copyright Clearance Center is very far from comprehensive; only a relatively small percentage of publishers license their works this way. Not all the publishers that license through the CCC, and not even all the plaintiffs in the GSU case, allow their works to be used under this blanket license; Cambridge University Press was forced to admit during trial that their material would not have been covered even if GSU had purchased the AACL. So the price difference becomes explicable — you pay less to get less.

By the way, this claim about how cheap the AACL is elicited a [very telling question](#) from Andrew Albanese of *Publisher's Weekly*, who asked if these three publishers had really decided to sue 4 million dollar per year customers for only \$114,000. The answer clearly is that they expect much greater profits if they win.

Now let's go back to the last set of filings. Reading the plaintiffs' brief, I was struck forcefully by the realization that they are asking the Judge to eliminate fair use virtually entirely for academia and instead substitute a compulsory license. This is especially clear when you see in their proposed injunction a requirement that permission be obtained for 90% of the readings in any course, regardless of whether or not some or all of that 90% could be considered fair use (under the extremely restrictive definition provided in the proposal). This is essentially asking the court to force a license even where the law — under anyone's interpretation — does not require it. So it begs the question, can the AACL function as a compulsory license? I think three observations should be made.

1. For the AACL to function as a compulsory license, it needs much broader coverage. It cannot play the role that the GSU plaintiffs would assign to it until everyone, or nearly everyone, licenses their materials through it. If the Judge were to agree to the plaintiffs' injunction, she would have to order those three publishers, at least, to license their work comprehensively through the AACL.
2. The example of Access Copyright shows us that the price for the AACL will inevitably go up if it moves towards a role as a compulsory license. In fact, you can find a list of Canadian universities that have decided to forgo the Access Copyright license because of its huge price increase [here](#). So the rhetoric about what a good deal it is, already suspect, would become irrelevant.
3. Compulsory licenses nearly always require continuing judicial oversight due to the threat of monopolistic pricing and anti-trust concerns. Sometimes a government board plays that oversight role, as with Access Copyright in Canada or the Copyright Royalty Board and cable rebroadcast in the US, and sometimes a judge does it, as in the oversight of ASCAP. Is Judge Evans prepared to pull the CCC before her and keep them there in order to ensure a functional licensing scheme?

Of course, all of this speculation is irrelevant if the Judge accepts the fair use argument that is advanced by the defendants. Their brief states that argument very compellingly, in my opinion. Two points struck me with particular force.

First, the defendants address the frequent claim made by publishers that the Supreme Court, in *Campbell v. Acuff Rose Music*, has limited fair use to situations that are transformative and that copies for educational purposes are not transformative. The defendants proposed Conclusions of Law point out that *Campbell* itself expressly renounced this claim in two ways. First, it explicitly noted that "transformative use is not absolutely necessary for a finding of fair use." Then, in a footnote (number 11), the *Campbell* Court stated that "The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution." You seldom get such devastating language to direct against one of your opponent's central contentions.

The second really important aspect of the defendants' proposed Conclusions of Law is this simple (if grammatically awkward) statement, which ought to be repeated like a mantra whenever fair use is discussed, because it is so obviously right: "The fair use defense would mean nothing if it addressed only those uses that plaintiffs have not developed a mechanism by which to charge for such portions of the work."

Fair use is frequently described as flexible and as an "equitable rule of reason." The value of defendants' arguments in this case is that they aim to defend this reasoned flexibility and ask the judge to avoid both of the common, and mistaken, constrictions of fair use — to either only those cases where an original is transformed or only cases where a "market failure" has occurred. Both of these conceptions would reduce fair use to a mechanical test that would contradict its avowed intent and application over the past 170 years.



# What does scholarly communications mean to you?

*Fri, 12 Aug 2011 14:04:51, ksmithl2@duke.edu, [category: open-access-topics, category: scholarly-publishing, category: technologies]*

Recently I had a somewhat unusual question from a library student who is working in a library where part of her assignment is to look for grant funding opportunities related to developing a scholarly communications program. After telling me that the whole concept of scholarly communications was somewhat bewildering, the student asked me what search terms I thought she should use when looking in databases of grants and funders.

The question was sufficiently off center, I think, that it forced me to reflect on the meaning of this “baggy monster” discipline from a different perspective and to formulate a fairly succinct but comprehensive reply. Here is my answer:

“Let me answer this by suggesting four words that I would search on and, with a bit of explanation about each word, maybe give you some perspective on what scholarly communications means (in my opinion, anyway).

“Publishing” — the origin of most scholarly communications work is in trying to understand how the publishing process for scholarship is changing in the light of new technologies, and what the library role is in assisting or adapting to those changes.

“Copyright” — when some institutions talk about scholarly communications, their major need is advanced knowledge about copyright law. This has become a problem on lots of campuses, again because of advances in technology, and it explains why so many people who are hired into scholarly communications positions (including me) are lawyers.

“Open Access” — this is the area where there seems to be the most push for change to traditional publishing models, and the place where libraries are developing lots of programs. Libraries often administer institutional repositories, for example, which provide open access to faculty and student scholarship. These efforts co-exist, usually, with traditional publication, and figuring out if and how scholarly publishing will transition to open access is the big issue for scholarly communications right now. BTW, other open access projects in libraries include hosting open journal publishing platforms, administering funds to pay the article processing charges that some open access journals charge, and advocating for public access programs like the NIH’s PubMed Central requirement.

“Research process” — at its core I believe that libraries’ attention to scholarly communications means a deeper involvement with the whole research process as it occurs on our campuses, where in the past we have focused only on the output and input (published works) stages. This means that libraries may be more involved in help to curate research data, manage versions of research output, and focus on access to the local resources of a particular campus, rather than on those published resources that are increasingly available to all without the intervention of libraries.

Looking back on what I have written, I guess I would add “technology” and “institutional repository” as search words.”

While I hope this reply was helpful to the student, I realize how incomplete and sketchy it is. It seems like a perfect opportunity to ask others to comment. So please leave a comment and suggest other words that would be appropriate search terms and other ways to describe and discuss the ones I have mentioned. Let’s see if this can be a useful thought experiment.

# Am I really “the public”?

Tue, 09 Aug 2011 14:07:02, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]

This post is a collaborative work by David Hansen and Kevin Smith.

One of the consistent themes in this space has been the increasingly poor fit between the copyright law as it stands and new technological options for communication that seem to be developing so quickly. While it is not directly related to *scholarly* communications, a [recent court case](#) about remote DVD players serves as a nice illustration of the tensions that arise when we tried to pour the new wine of technology into the old wineskin of our 1976 copyright act.

As explained by [Wired.com](#), the system works as follows:

The company literally rents you a DVD and a DVD player, with your computer, tablet or Google TV as the remote control. Unlike the other streaming movie services, Zediva doesn't turn a movie into a file on its servers that it can serve to as many users as care to see it at once. Instead, Zediva's servers have DVD drives and actual DVDs. So when you rent a movie, that disc goes out of circulation until you release it back to the company, just like in one of those increasingly rare real-world video stores. And like those video stores, Zediva doesn't need to get permission from the studios to rent out discs, since once they buy the DVD they are free to rent it out or re-sell it, thanks to the first-sale doctrine in U.S. copyright law.

[One article](#) calls Zediva a business relying on a “loophole.” But these “loopholes” are key to figuring out how copyright law applies in the digital age, and whether we will allow terminology routed in the mid-20<sup>th</sup> century to restrain innovation in the 21<sup>st</sup>. The judge presiding over the Zediva case viewed its conduct as outside the law, and ordered the service to halt operations. Central to the his order forcing Zediva's to temporarily halt operations was his holding that the service likely “transmits” the DVD content to “the public,” thus violating the rights holders' exclusive right to control public performances of the work ([17 U.S.C. § 106\(5\)](#)).

Copyright law defines the public performance right as exclusive control over either performance or display of a work to a group outside a normal circle of family or social acquaintances, and “*to transmit or otherwise communicate a performance or display of the work . . . to the public*, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” The terms “transmit” and “the public” are italicized because it is the definition of these two terms that determines both the case and the way copyright law responds to new cloud-based, personalized services like Zediva.

First, what does “transmit” mean? The copyright statute states that “to ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” The judge in the Zediva case concluded that the service “clearly transmits plaintiffs copyrighted works” because the service “communicates” images and sounds beyond the place from which they are sent. But this raises the question—who communicates to whom? The Zediva judge held that “the fact that Zediva's customers initiate the transmission by turning on their computers and choosing which of Plaintiff's copyrighted works they wish to view is immaterial.” Transmission, under this theory, is omnipresent. While this construction is plausible based on the bare

definition, it leads to absurd results. Can I really “transmit” or “communicate” with myself? Those rather existential questions aside, under this view every personal act to receive copyrighted works that are stored in a remote location is therefore a “transmission.” Of course, even under this expansive definition of “transmission,” there is still no infringement unless those “transmissions” are “to the public.”

So this raises the question, what does “the public” mean? There is no definition of “the public” in the act, but it does specify that “the public” need not receive the transmission “at the same place . . . [or] at the same time.” But can a transmission really be public if it is initiated and received by the same person? The Zediva judge interprets it this way, based on the relationship between Zediva as a corporate entity and its users as “the public at large.” But it is not at all clear that this is the sense that “the public” should have when interpreting the copyright act, where public is intentionally contrasted with “private.”

As with the judge’s treatment of “transmission,” this approach to “the public” leads to absurd results. I am a user of Dropbox, which is a commercial service. If I save a copyrighted article, of which I have made an authorized copy, to my Dropbox folder, then download it to my iPad (as I often do), have I really transmitted that article to the public? The judge does try to distinguish personal copies from those retained by the Zediva service, but his use of “the public” does not seem to provide any principled ground for this distinction.

Of course it is possible that the Zediva customer will have thrown open his doors and invited the masses to see the rented video stream, but that is just as possible if the DVD of the copyright work is on site as well. Does the mere fact of transmission make that risk any greater? If not, how do we justify restricting the transmitted performance more than the “physical” one? As this [TechDirt column](#) suggests, this approach seems to mean that copyright compliance depends on the length of the cable between the DVD player and the recipient’s TV.

This whole case serves as a reminder of how important it is for us to examine carefully those words in the law that seem obvious, vague or even unimportant. These “loopholes” actually are central to figuring out how the law will accommodate new technologies and where, potentially, the law itself must change.

# An easy fair use ruling, but with a message

*Tue, 16 Aug 2011 10:31:09, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

The case of [Brownmark Films v. Comedy Partners](#), which was decided last month in the Eastern District of Wisconsin, raises two really interesting issues for this blog. I plan to address one of them — fair use — now and save the other for a subsequent post.

I do not want to rehearse the facts in detail here. Suffice it to say that the case involves a claim that an episode of South Park infringed the copyright in plaintiff's music video, which the judge calls "cryptic" and I call simply crude. The much more difficult half of the case involves the issue of a transfer of exclusive rights, and I will discuss that later. But for academics, I think, the most important aspect of the decision is how it deals with fair use.

The fair use call is really pretty easy in this case; inclusion in South Park is virtually prima facie evidence that a work is being parodied. Indeed, the judge has little difficulty deciding that the use of less than one-third of the original music in a video featuring a different character and intended to mock the viral video phenomenon is fair use.

What is significant here is that the judge made the fair use decision before there had been a trial. He examined the pleadings and found that everything he needed to make this easy call was already before him. Then he ruled favorably on a motion to dismiss the case on the basis of those pleadings (technically a "motion to dismiss for failure to state a claim") and dismissed the case with prejudice (which means plaintiff cannot re-file it).

Librarians and other academics are often afraid to rely on fair use, even when their arguments would be strong, because of the expense of defending a lawsuit even when you win. Content companies often encourage that fear, reminding academics that fair use is a defense that can only be decided with certainty at a trial. While this case is a little bit unusual, it invites us, I think, to look at this "chilling effect" and perhaps lend it less credence.

In his ruling to dismiss, Judge Stadtmueller explicitly notes that "evaluating an affirmative defense, and indeed the 'fair use' defense, at the pleadings stage is 'irregular'." But he thinks it is justified precisely because when the case for fair use is "obvious," "the court can conclude that this dispute does not warrant 'putting the defendant[s] through the expense of discovery'." In other words, in straightforward cases, a fair use claim can be evaluated before there is a trial, explicitly to prevent the cost of litigation from itself becoming an obstacle to proper exercise of fair use.

The phrase "affirmative defense" is itself a little bit misleading in this context, I think. By definition, an affirmative defense is one in which you admit the truth of the facts alleged but then prove new facts that nevertheless defeat the charge of claim. Self-defense is a classic example of an affirmative defense — the defendant admits the killing but proves facts that justify it.

Fair use is slightly different than the typical affirmative defense. It has to be raised after a claim has been made, of course, but it does not actually involve admitting the truth of the allegation. Fair use is not a justification for an infringement; by the language of section 107 fair use is "not an infringement of copyright." So rather than showing a reason for infringing on someone else's right, the fair use defendant is proving a limitation of the plaintiff's right that means that no infringement took place.

Because it functions as a limitation on the right in question, fair use is actually a perfect example of a place where a copyright infringement claim should be dismissed because of a “failure to state a claim.” That describes perfectly what is going on — because fair use has been established, the plaintiff did not have a right that was infringed in the first place. Because fair use is “a mixed question of fact and law,” there will always be specific circumstances that must be adduced, but if those facts are plain on the face of the complaint, as they were in *Brownmark Films*, a judgement at that stage is entirely appropriate. And that possibility reduces the sense that even a strong fair use claim is not worth litigating.

I like to think of fair use as a boundary on the rights in copyright, just like physical property has a boundary. One way I could defend a claim against me for physical trespass would be to prove to the court that I never actually stepped on the plaintiff’s property. I would raise that evidence in a defense, but what it would show was that no violation of the property right ever took place — that the plaintiff had not stated any claim. That is exactly how fair use functioned in this case, and that possibility offers an important perspective on fair use.

Next post we will discuss the issue of transferring an exclusive right by a joint copyright holder and what impact that has on publication agreements

# When is “exclusive” really not?

Fri, 19 Aug 2011 14:32:17, ksmithl2@duke.edu, [category: licensing, category: scholarly-publishing]

In our previous post we talked about the relatively easy fair use call involved in the [Brownmark Films case](#) decided by the district court in Wisconsin. Before the court even got to that issue, however, it had to decide a procedural issue that has potential ramifications for scholarly publishing. Who can grant an exclusive license?

In the *Brownmark* case the original video that was allegedly infringed was, as most video and an increasing number of scholarly articles are, a work of joint authorship. That means that each copyright holder owns an equal and undivided share of the rights, and each can exercise those rights independently and authorize others to do so. Under long-standing precedents, each joint holder of a copyright can license the rights to third parties without the approval of the other rights holder, subject only to a duty to account to those other rights holders for any profits made. But in *Brownmark* the issue arose (as it has before) of whether or not the licenses given by a single co-owner of a copyright can ever be exclusive.

To illustrate the situation we are dealing with, let's assume there are three co-owners of copyright in a particular work, whom we will call A, B, and C. Let's further assume that A and B are not involved in the transaction in question, or in the court case (as was the case in *Brownmark*). So, acting on his own, C gives a license (which he calls exclusive) to Y, who is now our licensee. Later on, someone comes along and allegedly infringes on the work and Y wants to sue. A potential plaintiff only has standing to bring a lawsuit, however, if they hold an exclusive right. So the accused infringer defends by saying that Y is not allowed to file the suit, since they could not have obtained an exclusive license from C because C did not own the entire right in the first place. This is the situation we must examine.

In an earlier case (called [Sybersound v. UAV](#)), the Ninth Circuit Court of Appeals held that a co-owner of a copyright could never give an exclusive license. This is the intuitive position, I think, because any license C gives to Y will still be subject to other licenses potentially granted by A and B to other parties. What sense does it make to call Y's license exclusive if other people — even a great many other people — may also have the right to do exactly the same thing, simply by licensing that right from a different co-owner?

In spite of this intuitive appeal, the *Brownmark* court chose not to follow *Sybersound*. Their concern was that if there could not be an exclusive license, the licensee was left with no way whatever to enforce his right. While the judge admitted that it was linguistically odd to call a license “exclusive” even when there could easily be multiple parties licensed to exercise the same right, he felt that the alternative was worse, since it created a situation where no one was able to enforce the particular right (unless, of course, all of the co-owners agreed).

I don't know if this split within the Federal courts will eventually reach the Supreme Court for resolution or not. But I do know that whichever way it goes, the situation for scholarly articles written by multiple authors is problematic. It is often the case that A, B, C and sometimes many others are authors of an article and therefore co-owners (assuming each contributed protected expression). Usually one author is designated a “corresponding author” and completes all the paperwork with the publisher. The question is what the corresponding author, as a co-owner of the copyright, is legally able to convey to the publisher. Whichever court we follow, the question proves difficult.

If we follow the Ninth Circuit, our corresponding author is not capable of executing an exclusive license; even if her entire interest is transferred to the publisher, the rights obtained thereby are not exclusive and another author could, for example, release the article on the Web under a Creative Commons license. And in that Circuit, the publisher would lack standing to even bring a lawsuit to defend the rights it thought it had obtained. But if we follow the Wisconsin District Court the situation is only marginally better. The license is now called “exclusive,” and the publisher could bring a lawsuit against an wholly unauthorized third party to prevent infringement. Nevertheless, it remains the case that other authors could grant licenses in spite of the linguistically-challenged “exclusive” license given by the corresponding author. So it is still possible that the publisher obtains an exclusive license and yet the work could be distributed world-wide under a CC license by another of the joint authors.

Publishers usually attempt to avoid this situation by asking the corresponding author to warrant that she has permission to grant the copyright transfer or license on behalf of all co-authors. This might be an effective technique, but unless the corresponding author actually has written permission from each co-author, it ultimately depends on the somewhat various state laws regarding “agency.” In other words, a federal court hearing an infringement case and faced with a challenge to the right of the publisher to bring the suit would need to look at the applicable state law and decide if the publisher was justified in relying on “apparent authority” in accepting the corresponding author as an agent for all the other authors. In the alternative, a publisher could insist that all joint authors sign the publication agreement, but in an age when scientific articles often have dozens of authors, this seems impractical as well.

The techniques of scholarly publishing have worked well for many years; I know of very few (legal) disputes that have arisen amongst co-authors over publishing an article. But as articles are credited to longer and longer lists of authors, and the Internet offers an opportunity for each of those authors to decide on a more direct form of distribution, the uncertainty reflected by the *Sybersound* and *Brownmark* cases threatens to become increasingly problematic.



# Getting first sale wrong

Wed, 24 Aug 2011 08:50:27, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: scholarly-publishing]

Last week the Second Circuit Court of Appeals handed down a decision with potentially disastrous consequences for higher education. I admit that I have been reluctant to write about it because I cannot think of a good remedy for the situation and I dislike the [role of Chicken Little, always crying that the sky is falling](#). But with this decision two judges on the 2d Circuit really did open some cracks in the firmament above higher ed., and there is no way to ignore them.

In the case of [John Wiley & Sons, Inc. v. Supap Kirtsaeng](#), the court has held that the “First Sale” doctrine in copyright law — which allows libraries to lend books and consumers to resell the books they buy — applies only to works that were manufactured in the United States. In an earlier case ([Costco v. Omega](#), which was affirmed by an evenly divided Supreme Court) the Ninth Circuit had ruled that first sale did not apply if a work was manufactured *and sold* abroad, but the [Second Circuit went much further](#). In last week’s ruling they decided that first sale did not apply even when the work manufactured abroad was sold in the U.S. with the authorization of the copyright holder. Thus they have created the anomalous situation where a rights holder enjoys the full protection of U.S. law, but consumers who buy the work do not have the advantage of a basic rule for their protection.

The Second Circuit panel seems to know this is a bad decision, and yet they make it anyway. In a footnote they acknowledge that they are creating an incentive for content companies to move their operations, and the jobs that go with them, off-shore. And the very well-reasoned dissent also makes it clear that the state of the law did not require this sweeping limitation on first sale. After several readings I am still not sure why these two judges felt compelled to so dramatically change first sale after over a century of its successful application.

The irony of this decision is that in [creating an incentive for publishers to publish their books overseas](#), the “manufacturing clause” in the Copyright Act (section 602) was used by the Second Circuit panel to accomplish the exact opposite of what it was originally intended to do, which was to defend U.S. businesses. (Note, as a sidebar, this [article from Forbes](#) on the “chain reaction of decline” in U.S. manufacturing and imagine it getting worse as both law *and* economic conditions create negative incentives for U.S. manufacturing).

One of the problems that the Wiley decision creates is uncertainty about library lending. Libraries do not even know, I am afraid, how much of their collections are manufactured abroad. In the Second Circuit, however, lending anything that was manufactured outside the U.S. is now in question, regardless of where it was purchased (even directly from the publisher). The manufacturing clause that is at the root of this decision does contain an exception for the *importation* of books “for library lending purposes,” but it does not say is that libraries can actually lend these books. There was no reason to say that, of course, since Congress clearly assumed that first sale would apply. But Congress didn’t anticipate the short-sightedness of these two judges. And the situation is even worse for video, since the exception for audio-visual works in the manufacturing clause only mentions “archival purposes,” not lending. So potentially very large, and probably indeterminate, portions of a library’s collection in the Second Circuit (NY, VT and CT) may now be in a grey area — they can certainly be used in the library but may not be available for legal lending.

I hate to imagine it, but this decision raises some frightening possibilities and requires greater vigilance on the part of librarians. At the very least, libraries must demand information from publishers about where every item has been manufactured. Obtaining such information is no longer an option, since our legal uses of the things we buy now depends on knowing this, and the place where the publisher is located or where the sale took place is simply not sufficient. But what I really fear is that publishers will begin to manufacture more of their works overseas and then try to demand a higher price — one that includes “public lending rights” — from libraries.

If libraries are in a difficult position, students may be even worse off under the Second Circuit’s ruling. Again, publishers now have an incentive to manufacture their textbooks abroad and sell them to U.S. students. Such students would no longer have the right to re-sell their textbooks or to purchase used texts. The defendant in the case, Supap Kirtsaeng, had made a lucrative business out of reselling textbooks purchased in Asia. He was perhaps an unsympathetic party, but what he was doing was not different in kind from the resale of texts that is common on all college campuses. This activity makes higher education a little more possible for many. Now publishers have an easy way for to close down this secondary market for textbooks, about which they have complained for years. In the process, the cost of education for college students would be pushed up even further.

So what can be done about this appalling decision? There are very few real options, but here are some suggestions:

- In the short term, libraries can demand manufacturing information and, for works manufactured outside the U.S., insist on a “right to lend” being included in purchase agreements. If publishers try to charge extra for this, libraries must walk away from the purchase.
- The Second Circuit could be petitioned to re-hear the case *en banc*. The decision as it came out last Tuesday seems almost careless, and it certainly went beyond what was necessary to uphold the District Court ruling against Kirtsaeng. The Ninth Circuit rule from Costco would have been sufficient grounds for an affirmation, so there was no cause in either the facts or the law for this strange holding. Perhaps the whole Second Circuit could reexamine the situation and set it right. But is the defendant willing to take this path?
- Congress could amend the law to make clear that first sale applies in the U.S. whenever a work is sold with the authority of the rights holder. Much in the Copyright Act indicates that this was the intent of the law in the first place, and either section 109 or 602 (or both) could be easily amended to reverse the harmful effects of the *Wiley* court’s misunderstanding. But is Congress really interested in technical amendments to the Copyright Act right now, however badly they are needed? The two Judges in *Wiley* themselves suggested that Congress could correct them if they were getting it wrong (they were!), but as the [ARL Policy blog](#) noted last week, this seems more like a taunt, in the current political climate, than a real option.

# Reform is in the air

Wed, 07 Sep 2011 07:14:45, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]

Suddenly lots of people seem to be talking about copyright reform proposals. One way to look at this is as an indication that the flaws in our current system are becoming increasingly obvious. [Several commentators](#) have noticed that the [passage of patent reform bills in both houses](#) of Congress (whatever you [think of the merits](#) of those bills) seems to coincide with a more general public recognition (including in an hour-long [episode](#) of *This American Life*) that our patent system is so broken as to stifle the innovation it is supposed to encourage.

There is a sense of the same phenomenon occurring in Britain as it moves along toward copyright reform legislation. The British government's response to the Hargreaves Report indicated a desire to get copyright reform moving, and [this report from IP Watch](#) suggests that the reform effort is gaining momentum. Again, not all of the details are clear, and what we do know is mixed. The addition of a private copying right, which would decriminalize ripping a CD to listen on an iPod or scanning a journal article to read later, is a good start. If it is combined with a flexible exception similar to fair use in the US, the reform effort might really make an economic difference for Britain.

But most of the time, reform proposals are not as sweeping as what may be taking place in Britain; they tend to be responses to particular problems and are shaped to solve the perceived difficulty. I want to look at three such proposals in the United States.

First, Rep. John Conyers [got some press](#) when he called for reform that would clarify the situation for musicians and other artists who would like to exercise their "[termination right](#)" and recover rights to works they created. The termination right kicks in after 35 years to allow the artists to void copyright transfers and exclusive licenses, so some big-selling hits from the late 70s, which are still quite profitable, are at issue. Artists would like to reclaim the rights and get a larger share of the profit, which, after all, is how copyright is supposed to work. The recording industry has responded by saying that these works are "work made for hire" and not subject to termination. If one reads the [work for hire definition](#) in the copyright law with any awareness of how the music industry works, this claim is ludicrous. But to prevent endless litigation, Rep. Conyers would like to clarify those provisions so it is clear that artists are able to reclaim their rights.

Another problem in need of a legislative solution is the [recent decision about the first sale doctrine](#) that threatens the ability of libraries to lend works manufactured overseas and of students to resell their textbooks if they were printed in foreign lands. Here again a relatively simple change might be proposed. Instead of the phrase "lawfully made under this title" in [section 109](#) of the copyright law, the wording should be changed to "lawfully protected under this title." That would make it clear that if a copyright holder wants to have the protection of US law in the United States, consumers and users of their works will also have the normal protections of that law — nothing more, but nothing less.

Both of these proposals would require actions by Congress, and many feel that the current political climate makes such actions improbable, to say the least. A really creative take on reform, directed not at Congress but at state legislatures, comes in this paper on "[A State Law Approach to Preserving Fair Use in Academic Libraries](#)" by David Hansen of the Samuelson Law, Technology and Public Policy Clinic at UC Berkeley. David's paper, which gets [favorable notice](#) from the Law Librarian Blog, does an excellent job of explaining why it is problematic that library licenses so often limit fair use rights and of how federal courts — where copyright claims are heard and licensing matters usually decided based on

“supplemental or ancillary jurisdiction” — have no incentive to investigate the propriety of those provisions. So David proposes state-by-state reform of contract rules to make such restrictions void as a matter of contract law, at least in regard to public colleges and universities. David correctly points out that state legislatures, concerned as they are about how public education funds are spent, have a real incentive to look at this and to realize that this simple provision would increase the efficiency of money spent on licenses.

Hansen’s proposal is very modest, and one hopes it is possible to get more sweeping reform than he suggests. He makes a good case for starting with state governments, however, and has a depressing analysis of the likelihood of Congressional action. In any case, a reform of contract rules that govern state institutions of higher education is a great place to start, and perhaps — just maybe — we are beginning to see a groundswell that can move reform up the ladder.

# Why is adopting orphans controversial?

*Mon, 12 Sep 2011 14:11:29, ksmithl2@duke.edu, [category: fair-use, category: libraries]*

Ever since [Duke, along with Cornell, Emory and Johns Hopkins Universities, announced](#) that we would be participants in the Hathi Trust's Orphan Works project, I have been talking with a number of different reporters, trying to explain what the project is and why we are doing it. I was rather pleased to see that the [best article](#) written by reporters with whom I spoke was in the Duke Chronicle, our student-run newspaper.

One of the most difficult points to explain to reporters with no background in the minutia of copyright law (and why should they have one?) is exactly what an orphan work is. Several interviewers have simply seen them as part of the general class of e-books, and I have had to take pains to dissect that broad concept for them.

Basically, "e-book" can refer to commercial products sold or licensed under the authority of the rights holders — this is the largest category of e-books in most library collections — and to digitized public domain works such as those included in Project Gutenberg (whose [founder Michael Hart died recently](#)). In between are orphan works, a third category of works defined, in some sense, by the fact that they do not fit into either of the other two. Orphan works, whether in print or digitized, are books that are still protected by copyright (not public domain) and yet for which no rights holder can be located or permission for use obtained. That's really the key point about orphan works — there is no one to ask for permission, no one who can be found who is commercializing the work or even has the right to do so. The options for these digital books is either total obscurity, or access under fair use; there is no third alternative.

The rights holders for orphan works probably fall into two categories. The first is publishing firms that have gone out of business and for which there is no record of a "successor in interest." The other are the heirs of individual rights holder who have died without explicitly directing the disposition of their intellectual property. Identifying a work as an orphan involves a reasonably diligent search to determine if a specific work still has an identifiable rights holder or if, in the absence of other evidence, it falls into these "orphaned" categories.

Making the digital files of orphan works held in Hathi Trust available to restricted scholarly audiences should really be a no-brainer. The absence of any market that can be harmed, combined with the limited educational and research use, makes the fair use case quite easy. So I was curious to see that [one short article](#) about the project called it "controversial," while [this online forum](#) invited readers to vote on whether or not it is "within copyright law." I would very much like to know where the controversy is, and what reasons those who have voted "no" in the poll have for their opinion. I suspect there are some significant misunderstandings about the project behind those votes.

Whatever controversy there may be apparently exists because of a single quote, printed in the Chronicle of Higher Education when Hathi and the University of Michigan first announced the project, which called the project illegal and the product of "elfin whimsy." It was the kind of ill-conceived remark that I think anyone who talks to reporters dreads blurting out without proper reflection. But it is important to understand that there is no whimsy at all behind the project or the decisions made to participate. All of the participants have discussed the situation with both campus lawyers and academic administrators. Each, to my certain knowledge, has made a careful and responsible decision. On each campus, I believe, the same fundamental realization has dawned — this project is not a risk, either to the schools or to the

legitimate interests of publishers, nor the product of a radical interpretation of the law. It is exactly the core of what fair use was developed to accomplish.

# Is it all about the Orphans?

*Thu, 15 Sep 2011 13:34:37, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

In my post about the Author Guild's lawsuit against HathiTrust and some of its university partners, I promise to consider further the question of why the complaint was so focused on orphan works. Why the plaintiffs put so much emphasis there, since presumably they cannot show that they or the members they represent actually hold any copyrights in those specific works? In a [story for Inside Higher ed.](#), a spokesperson for the Authors Guild maintains that the suit really isn't about orphan works; nevertheless, I continue to think that that is exactly what it is about. [Jennifer Howard from the Chronicle of Higher Education gets it right](#), I think, when she writes that "The plaintiffs seek to take control of those files out of the hands of libraries until Congress establishes guidelines for the use of digital libraries and orphan works." The lawsuit seems most understandable, I maintain, as part of a strategy to dictate the terms by which the orphan works problem is "solved," and we need to look closely at what that strategy might involve.

In his [excellent post](#) about the lawsuit, Professor James Grimmelman makes two comments about the Authors Guild's "grand strategy" with which I respectfully disagree. He says that the AG has switched positions and now opposes action on orphan works, and he suggests that the effect of the lawsuit will be to discourage Congress from getting into the orphan works arena at all. On the contrary, I believe that this is part of a campaign to get Congress to address orphan works by setting up a licensing scheme, similar to the one Canada uses, in which each use of an orphan work must be licensed and a royalty paid. I think the hope is to collect royalties on using orphans that will ultimately be distributed to authors (or [publishers](#)?) of similar "categories" of work. With the failure of the Google Books Settlement, I think this is the next attempt by the content industries to sell what they do not own on behalf of parties they cannot identify, and then keep the money.

One of the first bits of evidence I cite for this opinion is this [short report about comments](#) sent to the European Union, as it considers its own orphan works directive, from the International Federation of Reproduction Rights Organizations. IFRRO is the trade group for collective rights management groups, including US groups like ASCAP and the Copyright Clearance Center. In their comments, they tell the EU that "Orphan works should be administered through collective management and licensing," the rules and conditions of which should be left in the hands of those who publish similar "categories" of works. IFRRO does not address where the money would go, but the Canadian model for orphan works gives us a clue; when royalties are paid to collecting societies in Canada, they are normally held for five years (in case a rights holder surfaces) and then become part of the regular funds of the rights organization, presumably for distribution.

What IFRRO is essentially asking the EU for is the same kind of license to exploit orphan works that Google was hoping to get in its book project settlement. That settlement seems to be completely dead, but the prospect of monetizing orphan works put dollar signs in the eyes of the Authors Guild. Now I think the AG is hoping to clear the way for Congress to establish a scheme for collecting money from users of orphan works, probably using the Copyright Clearance Center, and distributing it eventually to their members. They want to make sure that no plausible mode of using orphan works, especially a non-commercial one, gets any traction, so that their lobbyists can go to Congress and say "only you can address this problem, and we have a plan all ready for you."

It's really worth looking at the Canadian model, which is described in this excellent article by De Beers and Bouchard on "[Canada's 'Orphan Works' Regime: Unlocatable copyright owners and the Copyright Board](#)," The Canadian law, we should note, authorizes an administrative board, not a collective rights organization, to grant licenses upon application for particular uses. But the royalties it orders are often determined by and paid to the collective rights groups, and I strongly suspect that it is a variation on this broad scheme that the Authors Guild would like to push.

In addition to its contextualized discussion of how the Canadian scheme works, the article's authors raise quite a few really important and challenging considerations about the specifics of any orphan works legislation. For example, how do orphan works schema address the special problems posed by "moral rights," which are often held by a party different than the copyright (economic rights) holder? Also, exactly when can an orphan works license be issued? For exactly which works is licensing permitted, and what kinds of uses will be licensed?

The Canadian Copyright Board always requires the payment of royalties for orphan works licenses. As we look at their system, it is important to ask how these payments fit in to the incentive scheme for new creation that copyright is intended to create. Are these payments, at least quite often, simply a tax on users that do not serve any role in encouraging new works? If a similar model is proposed in the US by industry groups, especially involving the collective rights groups, we would have an even greater problem of "rent seeking."

The most significant issue raised by the article is the relationship between licensed uses and those that benefit from a statutory exemption. In the US, that raises the issue of how a licensing scheme for orphans would fit in with fair use, which is exactly the issue the Authors Guild tries to duck by not addressing fair use in its complaint against Hathi. If we approached orphan works by creating a licensing regime, would a license be available even if a use was arguably fair use? Who would decide? And would the license thereby provide a protection against liability for a negative judgment on the fair use case, thus usurping the role of the federal courts?

As I read about the standards by which the Canadian licensing board makes its decisions about which uses to license and how to set royalties, I realized they were using criteria very similar to the fair use analysis. The good faith of the user, the commercial or non-commercial nature of the use and the character of the original work all come into play. This suggests to me that fair use — which is found in US law but not in Canada, of course — already accomplishes a lot of the work that a licensing scheme for orphan works might be expected to do, and that fair use is really the best model for dealing with orphans in the U.S.

Really the choice between a license model and fair use is an instance of the proverbial choice between security and liberty. By suing over a fair use claim about orphan works, the Authors Guild, I think, is hoping to force libraries to opt for security, and therefore pay for licenses.

The details, problems, and dangers of Canada's solution to orphan works led me to conclude, even before this new lawsuit made me suspect that a similar, but privately administered, system was going to be pushed in the US, that a better solution under US law would lie in the remission of potential damages (which Congress considered several years ago). In short, we *should* treat orphan works as simply a species of fair use and define a protection against liability for good faith users of orphan works that is similar to that which we already grant to employees of educational institutions (under 17 U.S. Code section 504(c)(2)) who make good faith determinations about fair use. That is precisely the solution Hathi makes plausible, and that the Authors Guild wants desperately to suppress lest Congress figure out that a fair use solution could really work.



# Stop the Internet, we want to get off!

*Tue, 13 Sep 2011 10:47:30, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries, category: open-access-topics]*

It seems I spoke too soon. Only hours after I posted on this site a comment about why the HathiTrust orphan works project should not be controversial came news that the US Authors Guild, joined by similar associations in two other countries and eight individual authors, [has filed suit](#) to enjoin Hathi from proceeding with the project and seeking to impound all seven million digital volumes held by Hathi that may still be protected by copyright. Professor James Grimmelmann of New York Law School declares that [“the Orphan Wars are upon us.”](#)

Let’s start by being very clear about what these plaintiffs are asking. In their complaint they list 62 works to which named plaintiffs hold copyright and also assert “associational standing” based on their representation of other unnamed copyright holders in unnamed works. To protect those few works from distribution by Hathi, which as far as I can tell is not actually imminent, the plaintiffs ask to impound and remove from Hathi 7 million files. AG President Scott Turow calls Hathi [“an intolerable digital risk.”](#) To me the real risk is that the foolish actions of Turow and his handful of followers (all but one of the plaintiffs are officers of one of the associations) will threaten the tremendous cultural potential of Hathi and similar projects simply because they are frightened of the Internet and have not yet figured out how to make money off of it.

Professor Grimmelmann has an excellent analysis of the complaint at the link above, and Kenny Crews of Columbia offers [his comments here](#).

My own reading of the initial complaint — I doubt it is the final version — suggests a notable absence of logical argument. The [press release](#) the plaintiffs issued yesterday was full of protests and anguish, but did little to state a real case against Hathi. As it turns out, the complaint itself is not much clearer.

As Grimmelmann points out, one issue for the association will be standing to sue. Assuming that plaintiffs hold valid copyrights in *some* works that were digitized by Google and are held in the HathiTrust, they claim to have standing to object to the digitization of their works — but Google is not named as a defendant — and to the distribution of digital files back to the universities and into the HathiTrust. By itself, this would not, in my opinion, support an injunction; there is no sense of imminent harm. So then the complaint makes a dramatic turn and addresses the orphan works project, claiming that it is an illegal distribution. But they provide no evidence that any of the plaintiffs actually hold any rights in those works identified as orphans or that they represent anyone who does. So if the whole argument is needed to justify the injunction being sought, there may be a question of whether any of these plaintiffs have standing to seek it. They need to show an immediate prospect of particularized harm, and I don’t think they can do it.

Another place where logic fails in the complaint is when the plaintiffs try to explain why the digitization and preservation is illegal. Early on in the document they note that “The Universities have publicly defended their unauthorized digitization activities by claiming their conduct benefits society and is permissible under the fair use doctrine set forth in section 107 of the United States Copyright Act.” They then declare that “[t]his position is without legal support” and immediately turn to a discussion of *section 108* of the copyright act. They never again mention fair use or address it as a potential defense, although they dedicate three pages later on to an elaborate, and irrelevant, discussion of section 108, which is the section that lays out specific exceptions for library preservation and for interlibrary loan.

The argument here seems to be that section 108 fully defines what libraries can do with copyrighted work and, if it is not permitted under 108 or authorized by the rights holder it is therefore infringing. But this is wrong; the argument is defeated by a single short phrase found in section 108 itself, at subsection (f)(4), where the law states that “Nothing in this section... in any way affects the right of fair use as provided by section 107.” Libraries still can rely on fair use, and it is interesting that the text of the law itself calls fair use a “right,” not merely a defense. Like it or not, the plaintiffs’ claim will have to withstand an assertion of fair use, and if they cannot address that fair use claim they are doomed, one hopes, to failure.

The fact is that the Authors Guild has not been doing very well on the litigation front recently. Their attempt to sue Google and then settle with it in a way that would allow the monetization of orphan works has failed, and the case is currently in limbo. It is interesting to speculate on whether or not this filing is intended in any way to influence the outcome of that case; perhaps they hope to persuade Judge Chin in that case that Google and its partners are not reliable actors to deal with the orphan works problem. The Authors Guild was also recently dealt a setback in its long-standing Tasini litigation when another judge refused to certify a class for class action status. Instead of becoming litigation-shy, it appears that the Authors Guild wants to raise the stakes. At least they have not tried to bring this case as a class action as well.

The reference to how we might solve the orphan works problem in this country and elsewhere gives us a clue, I think, to what is behind this lawsuit and why it takes such an odd and twisted form. I think what is really going on here is an attempt to forestall ANY exploitation of orphan works until and unless the industry lobbyists can convince Congress to pass legislation that allows them to make money from those works. The plaintiffs never address the defendants’ claim, to which they refer, that Hathi provides a social benefit, and I think that the point of the lawsuit is to make sure that they get paid before anyone is able to take advantage of that benefit. I will have more to say about this possibility in my next post.

# An open letter to J.R. Salamanca

Fri, 16 Sep 2011 14:12:56, ksmithl2@duke.edu, [category: authors-rights, category: libraries, category: open-access-and-institutional-repositories]

Dear Mr. Salamanca,

Earlier this week, only days after it filed its ill-advised lawsuit against the HathiTrust and five of Hathi's partner universities, the Authors Guild gleefully announced that they had been able to find, with relative ease, the author of one of the books on Hathi's initial list of orphan works. You, of course, were that author, and the work in question was your 1958 novel *The Lost Country*.

It is not a comfortable position to be a pawn in a game of "gotcha," especially when it involves litigation. What I want to say to you is the same thing I say to faculty authors at the institution where I work: "Consider carefully where your own best interests lie, and manage your copyright to serve those interests."

In one sense, your situation is quite unusual. Apparently you still hold the rights in *The Lost Country*, perhaps because you recovered them from your publisher based on a contractual arrangement. This was unusual in the 1950's, when federal copyright did not attach to a work until it had been published, and it is, unfortunately, still not the case for many authors, particularly those who write academic books. For many of them, rights must be surrendered in order to have a work published in the first place. So you are ahead of the game in that sense; you have a chance to really manage your copyright for your own benefit. Congratulations.

It seems clear that your book was included on the list of potential orphans in error. Of course, inclusion on that list was precisely intended to catch such situations, so the system [worked as it should](#). Your book has [not been included in any distribution](#) of orphan works. Now you have a chance to decide, however, if you would like to allow a more open distribution.

I am sure I do not have to tell you that libraries, including those that intend to participate in the Hathi Orphan Works project, [are not your enemies](#). We are in the business of helping authors find readers, which hardly seems like it should be an objectionable activity. So let's think for a minute about *The Lost Country* and what might be best for it and for you.

The sad fact is that *The Lost Country* has become a pretty obscure work. Amazon.com shows only two used copies available for sale. In the Duke Libraries, the last transaction record we have for your novel is in 2004, when our copy was sent to high-density storage. It has not left the facility once since then, and our system shows no circulations in the prior decade, either. One of the famous "laws" of librarianship is that every book should have its readers, and the current system, I am afraid, is failing to connect your book to new readers.

It has to be said that the Authors Guild is not going to help you in this regard. They are not going to publish a new edition of *The Lost Country* for you, nor will they pay you any royalties on the out-of-print edition. The Authors Guild simply does not have the ability to create a new market for your book. Even if they were to succeed in a grand strategy to impose a licensing scheme for orphan works in general, there is no reason to believe that you would profit from it. With such an obscure work, potential users who had to pay a fee would probably just skip the planned use.

Where you *can* find help for this problem is with the HathiTrust. Their goal, and the goal of the libraries that plan to participate in the orphan works project, is to make it easier for readers to find works like your novel, which might otherwise languish on shelves or in large warehouses of books. Digital access to low-use titles through our catalogs will encourage users to discover resources, for study and for entertainment, that they might not have bothered with before.

In your own case, let's suppose a Duke student has recently seen the Elvis Presley movie made from *The Lost Country*. Intrigued, she "Googles" the book and finds that there is a copy held by our library. But to get it she has to send a request, wait 24 hours or so, then pick it up at one of the library service desks. Years of experience with college students suggests to me that most just won't bother; they will move on to something newer and easier to access. On the other hand, if that same record that she found with her Google search also contained a link to the book through Hathi, she might read a chapter or two. She might get hooked. You will have found a reader.

This is what libraries do; such serendipitous discovery is what we hope for everyday, and it is why we signed up with the HathiTrust. What Hathi offers to you is the opportunity to continue to find readers for the book on which you worked so hard.

Your "case," if I can call it that, illustrates two things. First, that the process of identifying orphan works in the Hathi corpus needs to be tested and refined, which Hathi is committed to doing. Second, in the rare instance like yours where the process actually turns up an author who does still own copyright, the rational course for that author is to embrace the mission of Hathi and of libraries everywhere of connecting books with readers, and to exercise their right to make their book(s) fully viewable. Please believe me, that is a much better option than having a book live out its term of copyright on hard-to-access shelves in high-density storage.

# Getting light right

*Tue, 27 Sep 2011 08:30:04, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The only thing I know about the speed of light is that it comes too early in the morning (which apparently is a quip from American disc jockey Danny Neaverth). I used to think that I also knew that nothing could travel faster than the speed of light, but my store of certainties has been reduced by one. There is now considerable debate about whether or not an experiment performed at CERN has shown that a subatomic particle can travel faster than 186,282 miles per second. The variation from that speed is quite small, and it is only one experiment, but it is so significant that it has received a lot of press. There are New York Times stories about the article [here](#) and [here](#), for example.

One noteworthy feature about this spate of attention and speculation is that the [article itself is available](#) for anyone to read, on the repository for high energy physics called [Arxiv](#). Having the article available for open access is often important for researchers in this fast-moving field, since advances and discussions now typically move faster than the speed of traditional publications would allow (although not as fast as neutrinos). But I want to stop a moment and consider what open access means for the rest of us, at least around a high-profile but highly technical article like this one.

One of the things open access advocates hear a lot, both from authors and from publishers, is that many articles are just too technical, and most people cannot understand them. The handful who can, this argument goes, will see the article published in the expensive flagship journal in the field, and that is all that matters.

Putting aside the questionable assumption about whether everyone capable of understanding a specialized scientific article really does have access to all the journals — my experience as a librarian makes me think this is false — what value is there in making articles available to those who would struggle to understand them? One set of advantages can be seen clearly when an article suddenly becomes the subject of media reports, as happened here.

First, when an article is available in open access, reporters are more likely to find the research and write about it. And faculty researchers here at Duke have told me that the reporting about research made available openly tends to be more accurate, since reporters can check what they say against the original. News like “breaking” the speed of light would be reported no matter what, but other research breakthroughs, often reported on our institutional websites, are more likely to get into the mainstream press, and to be well described, if the articles are freely available.

Second, when reporters are looking for sources to comment on a published experiment or discovery, they often turn to other scientists. When they do, the ease with which those experts (who really may not be at institutions that subscribe to everything, since no institution does) can see the original work improves the quality of their comments. In cases like the speeding neutrinos, pretty much everyone agrees that the results will need to be confirmed or refuted by many more experiments. Replication of the result will be a long and expensive process, limited to a very few, but even those who cannot actually work with a particle accelerator will be in a better position to understand the results, contribute insights and help interpret nuances about what is discovered, especially if the process continues to occur in the open.

Finally, even for laypeople like me there is an advantage to actually seeing the paper. I admit that I struggled just to comprehend the abstract. Yet it is salutary, I think for folks like me to see how real science is done and reported. Looking at the original paper is an antidote to all the “Einstein was wrong” journalism; those who click through to the original see modest claims being made very carefully, and scientists who are open to others proving them wrong. The calm, methodical and qualified nature of the claims provides an important balance and a healthy glimpse of what science should really look like.

We often hear about “junk science,” and it is not clear how well the news media determines the quality of a scientific claim. Too often it seems based on who is being the loudest or make the most attention-grabbing claim. By having their work available in open access venues, scientists can counteract that tendency just a bit. Besides, if valid science is all behind subscription barriers, we have no cause to complain that the media primarily reports on the junk, or at least fails to make judgments about quality. Far better for the scientists and for society if the valid work is also out there in the marketplace of ideas, with an equal claim on the attention and critical judgment of the public.

# Really, what has Princeton done?

*Fri, 30 Sep 2011 13:17:35, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

When it was announced that the faculty at Princeton University had [unanimously adopted an open access policy](#) for scholarly articles they authored, it was great news for the open access community, but it was also the cause of some overheated rhetoric. Since the operative language of the Princeton policy differs very little from that that was adopted at Duke back in March, 2010, this is a good opportunity to reflect on what has, and has not, been done.

In all such policies the university is given a license in the works that is prior to any copyright transfer to a publisher. Technically, therefore, the rights that are transferred are subject to that license; hence the language of “banning” the wholesale transfer of copyright, which has received a lot of attention. I wanted to point out, however, that this rhetoric about a “ban” did not come from Princeton itself, but from a single blogger, to whose post all the stories that use that language point. That blogger has now changed the post, including a quote from a Princeton official saying that the faculty is not being “banned” from anything. Even the URL has changed; the corrected version of the post is [here](#).

The differences amongst universities regarding these policies come in implementation. Some universities may elect to act in a way that is contrary to the terms of the publication agreements the authors enter into (by posting articles or versions of articles where the publication agreement purports not to permit the specific posting). Doing so would seem to be legally permissible under the claim of a prior license, but it could also put the faculty members in a difficult position unless they are very careful about what they sign (as they should be but seldom are). An alternative is for the university to exercise the license in a more nuanced way, taking into account the various publisher policies as much as possible. That, of course, makes open access repositories much more labor-intensive and difficult, especially as publishers [change their policies to try to thwart these expressions of authorial rights](#). How Princeton will actually implement its policy is still an open question, since they do not yet have a repository of their own.

Earlier today I received an inquiry about the Princeton policy from a colleague at another university. To what degree, he asked, is this similar to the university simply claiming that scholarly articles are work made for hire? My answer, of course, was that these policies are the very opposite of an institutional claim of work for hire. If that were done, in fact, no such license would be necessary. But these policies are founded on faculty ownership and express the desire of a faculty, as copyright owners, to manage their rights in a more socially and personally beneficial way. It is important to note that the open access policies now in place at a couple of dozen U.S. institutions have all been adopted by the faculties themselves; they decided to grant a non-exclusive license to the university, which, again, they could not do except as copyright owners.

Probably the most important fact about these policies, indeed, is that they represent an assertion of authorial control. We so often hear publishers and others in the content industry talk about protecting copyright, by which they usually mean the rights they hold by assignment from a creator, that it is salutary to remind academics that **they** own copyright in their scholarship from the moment their original expression is fixed in tangible form. Transferring those rights to a publisher is one option they have, and it has become a tradition. But it is only one option, and the tradition is beginning to be questioned, as [this recent article from Times Higher Education](#) and [this one from Inside Higher Ed](#) forcibly demonstrate.

Open access policies are not, at their root, either “land grabs” by institutions or acts of defiance aimed at publishers. They are simply a recognition of the fact that authors are the initial owners of copyright, and they express a desire by those owners to manage their rights intentionally and in a way that most clearly benefits the goals of scholarship.



# Streaming video case dismissed

*Tue, 04 Oct 2011 08:02:33, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use, category: technologies]*

Yesterday a judge in Los Angeles [dismissed the copyright infringement lawsuit](#) brought by AIME, the Association for Information Media and Equipment, against UCLA. The lawsuit had alleged that UCLA was infringing copyright by ripping DVDs to create a digital stream, which was then made available through a closed course management system to students in a particular class. There are several technical issues that dominate the decision, but there is a little bit of good news, hardly definitive, for the fair use claim that was being made by UCLA.

The two major reasons for the decision were sovereign immunity — the doctrine that state entities can seldom be sued in federal court — and lack of standing. AIME tried to argue that UCLA had waived its sovereign immunity when it signed a contract with AIME, but the judge rejected that argument as too broad. So a major part of the decision applies only to state entities; it does not translate to private universities.

As for standing, AIME had a little bit of the “Righthaven” problem; they simply did not own the copyrights that were allegedly infringed, so they were not the proper plaintiffs to bring the case. AIME wanted to claim what is called “associational” standing as a group that represents individual copyright holders, but the judge rejected that idea; she held that “individual copyright owners’ participation is necessary” in order to assert copyright infringement. It has never been entirely clear why the lawsuit was brought the way it was, and it is a relief, from the point of view of legal consistency, that this attempt to assert associational standing has failed. With Righthaven and a few other groups trying to create a business model based on copyright trolling, the failure of this claim for standing represents another welcome barrier to that activity.

Not, I hasten to add, that AIME is in any sense a copyright troll. The lawsuit was, in my opinion, inept, but it was clearly motivated by zeal and a sense of righteous indignation rather than baser motives. Calmer judgment simply got overwhelmed.

On the copyright issue, which is where I was most anxious to see the reasoning, everything pretty much turned on language in the AIME license that granted public performance rights to the licensees. Given that language, the case would seem to have been doomed from the start. But as a result, UCLA did not have to make the case that the streaming, as a potentially public performance, was justified by one of the specific educational exceptions in section 110 of the Copyright Act. That argument may yet be plausible, but it was not decided in this case.

What solace the higher education market can take from this case is in a few lines in which the judge seems to accept without discussion two assertions — that streaming is not a “distribution” such as to infringe the exclusive right to authorize distribution, and that copying incidental to a licensed right (the right of public performance) was fair use. These points were not, as I say, discussed or unpacked, just accepted as part of a general dismissal of the copyright infringement claim for “failure to state a claim upon which relief can be granted.” Thus this ruling does not offer the higher ed community a slam-dunk fair use victory, it merely sharpens a couple of the arrows in the quiver of that argument.

It is interesting to note that the copyright claims, along with most of the others, were dismissed “without prejudice.” This means that AIME could refile them, and the judge gave AIME two weeks to do

so if it wants. The problem, however, is that all claims against the Regents and against the individual defendants in their official capacity were dismissed *with* prejudice. So AIME could file the same claims again, but not against these defendants and not until it solved the standing issue. A claim against the individuals as individuals would still be possible, but it is doubtful it would have the effect AIME wants; instead, it would look like the act of a desperate bully who does not know when to retire from the field.

Whatever happens next in this case, if anything does, what the dismissal without prejudice should tell the rest of us is that the issue of most significance to higher education — whether or not streamed video for a course-related audience is fair use — has not been brought to a final judgment.

# The ironies of risk avoidance

*Fri, 21 Oct 2011 13:05:36, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: libraries]*

Start with a basic empirical premise: most librarians (and often the lawyers that advise them) are extremely averse to risk when it comes to copyright matters. Years of experience convince me that this is true. Many activities in a library create risk — letting the public in the door, hiring employees, signing licenses and other contracts — and we usually have policies and procedures in place to reduce and manage those risks. But with copyright we tend to take an all or nothing approach; either we must be 100% confident that there is no risk of infringement or we will not undertake the project. Copyright seems so big and scary that we decline to manage risk and try — we are never actually successful — to avoid it altogether.

The first irony about this approach is that the attempt to avoid risk actually creates risk. Every time we make a choice we both select one option and reject others. If I stay at work until 5 pm today, I will miss the chance to frolic in a gorgeous fall afternoon. Economists refer to the “lost opportunity” costs that are part of every decision. Perhaps the risk of these types of losses is most famously summed up by [John Greenleaf Whittier](#), who wrote, “Of all sad words of tongue or pen, the saddest are these, “it might have been.”

When we consider any decision, we need to balance the risk that something bad will happen if we act with the risk that something good will be lost if we choose not to act. For projects in libraries, which usually involve digitizing material in order to improve access, the loss of a real benefit is also a risk, and should be weighed against the risk of infringement. If we make a serious attempt to balance the risk, recognizing that there is indeed risk in both choices, we will be compelled to make, I believe, a more careful and nuanced assessment of the copyright situation involved in any such undertaking.

Which brings me to another irony, a small but recent example of exactly the risk avoidance (as opposed to risk management) that I am complaining about. Back in the late spring, I wrote a short paper about risk management for large-scale digital projects. In it I advocated an approach that looks at multiple aspects of copyright law when evaluating a potential project and balances the risk involved, after careful analysis, with the pedagogical reward to be gained by going forward (or lost, if a negative decision is reached).

Several colleagues who read the paper suggested that I should publish it, and so earlier this week I submitted it to [D-Lib Magazine](#). I was pleased to get a very quick acceptance, but less pleased to be told that the article would be published as an “opinion piece” and carry a disclaimer distancing the editors of D-Lib from my “opinions.” Why, I asked, was my article different from other academic writings, which almost always make a case for some position or action over against alternatives? The reason, I was told, was the subject matter. The editors did not know enough about copyright, they said, to be assured that my position was a sound one. They went on to say that their lawyers discouraged publishing anything about copyright, since readers might “take this as legal advice to their detriment” and create liability for the magazine.

This struck me as odd. Surely they do not believe that they, or any other journal editorial board, actually warrant the accuracy and soundness of every article they publish? I seriously doubt that the D-Lib editors personally guarantee that technical articles they publish, which sometimes recommend software or hardware solutions, will never lead to unanticipated bugs or security breaches. And I have never

once heard of an actual case in which a journal, whether peer-reviewed or not, was held liable for bad information in an article they published (as opposed to where the article is itself infringing or defamatory).

The logic here is flawed because what is really behind this approach is fear, and the irony is that that fear prevents D-Lib from addressing a topic that is of great importance to the world of digital librarianship. Fear could be dispelled by robust discussions and plentiful information about copyright issues, but instead a leading journal elects to remain silent, and therefore reinforces the perception that this is an area that librarians cannot address, must flee from.

In the age of digital libraries, nearly all of our decisions implicate copyright in some way. As a profession, we cannot afford to hide our heads in the sand; we need to seek ways forward, and the search for workable options will require information, debate and discussion. Copyright cannot remain a forbidden topic.

The decision not to publish my paper (I elected not to have it appear marked off as an opinion piece) probably is not any real loss to D-Lib or to the profession as a whole. The paper will appear later this year in another journal, and I will post it here as soon as I am able. Others must decide if it is any good or not. But regardless of the quality of my argument in that paper, the topic, and the sensitive analysis of risk that it demands, is not something we can avoid.

By the way, this blog post *is* an opinion piece. It, like everything else I write here, represents my own opinion and not the official position of Duke University. But you knew that without my saying so, didn't you?

# Silly Season

*Mon, 31 Oct 2011 10:37:15, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: digital-rights-management]*

It is traditional in political reporting to refer to the run-up to primary elections as the “silly season” because of all the amazing things candidates will say while trying to appeal to different constituencies and bear up under the glare of media coverage. Recently this time of year has also seen some developments in the copyright world that also justify some bewildered head shaking.

On the legislative front, the PROTECT IP act has been introduced in the Senate for a while now. It is problematic even in its Senate form, since it would allow private actions to attack web domains based only on accusations of IP piracy, without the usual due process that is necessary to sue an alleged infringer. But the act got worse, and stranger, when it was introduced into the House of Representative. A provision was added that would role back the “safe harbor” provision for ISPs from the Digital Millennium Copyright Act and impose an affirmative obligation for web hosting services to police content uploaded by users. This is in keeping, I am afraid, with the overall effort to force others — the ISPs and the government — to foot the bill for enforcing copyrights owned by the legacy content industries. Discussions of this bill are all over the Internet; a representative one can be found [here](#).

The argument that we should change the DMCA is becoming very common. The content industries do not like the bargain they made a decade ago, and seem increasingly to want to shut down the most productive aspects of the internet in order to preserve their traditional business models. An excellent argument for why we should not let this happen can be found in [this discussion of copyright, the Internet and the First Amendment](#) from Thomas Jefferson scholar David Post.

The real silliness, however, comes in the decision to [rename the bill](#) in the House, from PROTECT IP to ePARASITES. I sometimes believe there is a congressional office for acronyms, staffed by some very silly people. When I first heard this new acronym, I thought it was a parody. Although I now know that the “parasites” referred to are websites that facilitate unauthorized sharing, I initial concluded that it was a joke referring precisely to those industries supporting PROTECT IP who want the taxpaying public to bear all the costs for their failures to innovate.

Another round of silliness was created this week by the filing of a Second Amended Complaint in the [lawsuit between the trade group AIME and UCLA](#) over digital streamed video. The judge dismissed the First Amended Complaint about a month ago but gave the plaintiffs (AIME and AVP Video) permission to refile. This they have now done, but going through the (long) complaint, I fail to see how they have really addressed many of the judge’s reasons behind the dismissal.

A major reason behind the dismissal was lack of standing for AIME and sovereign immunity protections for the defendants. I noted at the time that the lawsuit would really need different plaintiffs and different defendants to go forward. Clearly AIME did not agree, since the new complaint names exactly the same defendants, simply with “and individual” added each time the previous document said they were sued in their official capacities. This new document does not remove the claims against them in their official capacities, even though the judge already dismissed those claims, and it does not add any facts that I could see that would justify a suit against the individuals. So the refiling really just seems to double down on the failings of the first complaint.

Also, AIME tried to rescue its “associational standing” but pointing to “injury in fact” to the association itself. Such injury, incredibly, seems to be primarily the damage done to AIME by its relentless pursuit of this lawsuit, which it brought in the first place. Staff time has been consumed, they say, and the reputation of the association harmed. New members are reluctant to join. Why any of this confers standing on AIME against UCLA is beyond me; members may not be joining because they do not want association dues spent tilting at windmills. Also, the judge already rejected the argument that “diversion of resource” for the lawsuit was enough to establish the required showing of injury. It is not clear to me that simply adding more detail can rescue this argument.

The new complaint again asserts that sovereign immunity was waived by UCLA when it signed license agreements with a jurisdictional clause, and by its own policy of obeying federal copyright law. Both of these arguments were already rejected by the judge, so reasserting them seems more like a criticism of the previous decision than a new argument.

On the substantive arguments, I also can see very little that has been added that should change the outcome here. The license between AVP and UCLA is reasserted, with the same language that caused the judge to read it in a way that undermined the first set of copyright claims. One addition is the claim that the UCLA system is “open” (which the license does not allow) because it has a guest feature that can be turned on, but there is no assertion that it ever has been turned on in fact. Another addition are the state law claims for tortious interference with a contract and prospective interference with a business advantage. Like the previous state law claims, this seems entirely founded on the copyright infringement claim, so I see no reason these would not be preempted by the resolution of the copyright issue, as the previous claims were.

In both these instances, I think we see the emotion of righteous indignation overcoming reason. The very thing, it seems, that makes this the silly season.

# Is the Copyright Office a neutral party?

*Thu, 03 Nov 2011 18:57:29, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation]*

Recently a friend was asking me about my job title. I was hired primarily to address copyright issues, but my title is “Director of Scholarly Communications.” I am, in fact, involved in lots of other issues encompassed by that broader title, but my friend made the valid point that universities are beginning to divide the copyright function out from digital publishing services and the like. Her question got me thinking, and I concluded that I like my title precisely because it emphasizes the context of my work. My job is not simply to know the copyright law, but to help apply it, and even work to change it, in ways that best serve the needs of scholars and teachers on my campus. I am not hired, I don’t believe, to be neutral; I have a defined constituency, and my title is a constant reminder of that fact.

This conversation came to mind as I read two documents released by the [Copyright Office](#) in the past couple of weeks. The constituency of the Copyright Office, presumably, is the public as a whole, and their role ought to be more neutral than mine, seeking the balance between protection and use that has always been at the core of copyright law. In these two documents, however, the tendency to think that, as the *Copyright Office*, advocacy for anything that increases copyright’s strength and reach is the proper role, shows through. The needs and voices of owners in the legacy content industries seem to get extra weight, while the needs of users, who are more diffuse and do not have as many dedicated lobbyists, get less attention.

In its [brief report on “Priorities and Special Projects of the United States Copyright Office”](#) the Office details the studies, legislation and administrative projects that it intends to work on for the next two years. In its legislative priorities, the first three listed are “Rogue Websites,” “Illegal Streaming,” and “Public Performance Right in Sound Recordings.” Each of these priorities is an endorsement of particular legislative action by Congress — the first [clearly endorses](#) the bill alternately called PROTECTS IP or SOPA or ePARISITES. Indeed, each of these priorities seems to be dictated by the current lobbying activities of the entertainment industry, and each is a very much non-neutral endorsement of greater scope for and stronger enforcement of copyright protections. There is little sign that the voices arguing that copyright already reaches too far and is over-enforced are being heard.

Other priorities do seem more neutral. The Copyright Office wants to “continue to provide analysis and support to Congress” on orphan works, and it repeats its intention of making legislative recommendations based on the report of the Section 108 Study Group, which addressed the specific exceptions to copyright for libraries.

This last priority created a rather humorous situation for me last week when I was contacted by a member of the library press seeking information about this “new” report on section 108. In fact, the report was issued in 2008. Nothing has come of it in three and a half years, and, even if all of its recommendations were suddenly adopted, it would do little to improve the situation for libraries because the Study Group was unable to find agreement on the most pressing issues. The Copyright Office does not mention the [more comprehensive proposal on library exceptions made by IFLA](#) to the World Intellectual Property Organization.

My real interest focused on the Copyright Office’s desire to do something about orphan works. In addition to the legislative priority listed, the report promised a study document on mass digitization, which would naturally have to address orphan works, and [that document was issued a few days ago](#).

Here we get a glimpse of how the Copyright Office plans to address the difficulties posed by orphan works.

The report makes the CO's preferred approach very clear — "As a practical matter, the issue of orphan works cannot reasonably be divorced from the issue of licensing." This is an interesting statement, since the last proposal to resolve the issue that the CO nearly got Congress to adopt a few years ago **did not** rely on licensing, but addressed the issue by reducing the potential damages for using an orphan work after a reasonably diligent attempt to find a rights holder. There clearly are other approaches, but the appetite of industry lobbyists has, since the Google Books case, been whetted by the possibility of profiting from other people's (orphaned) works, and the CO has been swept up in the licensing fever.

The report gives a detailed and very helpful discussion of the various types of licenses that could be used, but it never addresses the question that seems most pressing if orphan works are to be licensed — who is going to get paid? If works are genuinely orphaned, there is no rights holder to pay, so orphan works licensing proposals must decide who is going to sell the licenses and where the money is to go. [Other countries have adopted licensing schemes](#), and often the licensing is done by the government; in the U.S., however, I think we have to assume that private collective rights organizations (who are given prominent mention in the report) would collect the money and, perhaps after some period of time, keep it.

This report is about more than orphan works, of course; it addresses the broad issue of legal concerns in mass digitization. I was interested to see how fair use was treated, both in that broader context and in relation to orphan works. I was disappointed in both regards.

In the general discussion of mass digitization, fair use is pretty much summarily dismissed by the Copyright Office. It begins with the assertion that "the large scale scanning and dissemination of entire books is difficult to square with fair use," which seems to beg the question. The rest of the section reads like a legal brief against Google's position on fair use in the book scanning case. Nowhere does the report consider what difference it might make for a fair use claim if the project were wholly non-commercial, nor do they consider that fair use might be part of an overall project strategy that included other approaches, such as selected permission-seeking. The report treats fair use as an all-or-nothing approach and dismisses it as unworkable without the nuanced consideration it demands.

More troubling is the fact that, having dismissed fair use in the broader context of mass digitization, the Copyright Office never discusses it in the more narrow field of orphan works. With orphans, of course, fair use seems like a stronger argument, since there is no market that can be harmed by the use, especially if it is itself non-commercial. But it seems clear that the CO is committed to creating such a market by pushing a licensing scheme, and is not willing to discuss any option that might undermine its predetermined conclusion.



# The unexpected reader

Tue, 15 Nov 2011 10:41:46, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]

I have just returned from the Berlin 9 Conference on Open Access, which was held in Washington, D.C. at the lovely conference center facilities of the Howard Hughes Medical Institute. It was a fascinating meeting, and quite different in tone from the one I attended last year in Beijing.

In its opening paragraph, this [Chronicle of Higher Education report](#) on the conference captures the fundamental difference. This year the conference was much more clearly focused on the *impact* of open access on research; rather than talking about how open access will be accomplished, the discussion assumed that open access is inevitable and instead emphasized the differences that the evolution to open will make.

For the sciences especially, it was clear that openness is rapidly becoming the default, because awareness of its benefits is spreading so widely. This year the partners in the discussion included many working scientists and, significantly, many academic administrators and research funders, who are well-placed, and, increasingly, motivated, to make the transition to open access. The recent decision announce by the National Autonomous University of Mexico to [make a decisive transition to open access](#) is testimony to the impact a commitment by administrators can have.

Some of the most compelling discussion in Washington about the impact of openness centered on the idea of unexpected readers. For years researchers have assumed that, especially for highly technical work, all of the people who needed access to their work and could profit from it had access through the subscription databases. This assumption has probably always been incorrect, but now the promise of open online access has really blown it up completely. The possibility of unexpected readers, including computers that can make connections and uncover patterns in large collections of works, is now one of the great advantages of OA and one of the primary sources of the expectation for greater innovation.

One very touching story is worth retelling here to make this point. Philip Bourne, a professor at UC San Diego and Editor in Chief of the journal *PLoS Computational Biology*, told of a rather remarkable manuscript that was sent directly to him in his editorial role. He thought it was quite a special work of scholarship, on computer modelling of pandemics, and asked some of his colleagues with expertise in that field for their opinions. Uniformly it was felt that the article was ground-breaking. Finally, Bourne met directly with the author and, unusually, urged her to submit it to the journal *Science*. You see, the author was a fifteen-year old high school student who had done her research as a visitor in university libraries and, for a while, using a “test” login obtained directly from a vendor.

The point here is not the obstacles to access that this young author encountered and overcame. The point is that she was not at all the person the authors of previous articles on the topic thought they were writing for. Yet she made a remarkable advance in the field because she was able to read those works in spite of conventional expectations.

By the way, *Science* selected her article for [in-depth review](#), which is itself a big accomplishment for even experienced researchers, but ultimately decided not to publish her paper, which will now likely appear in [PLoS Computational Biology](#), as she originally hoped.

In his presentation to the Berlin Conference, law professor Michael Carroll listed five types of readers who should have access to research output, and who do have access when open access becomes the default. On his list of such “unanticipated readers” were serendipitous readers, who find an article that is important to them without knowing they were looking for it, under-resourced readers (like the high-school author described above), interdisciplinary readers, international readers and machine readers (computers that can derive information from a large corpus of research works). By the way, the category of serendipitous readers includes all those who might find an article using a Google search and read that work if it is openly available but will encounter a pay-wall if it is not.

Open access serves all of these unexpected readers of scholarly works. As Carroll summed up his point, every time we create an open environment, we get unexpected developments and innovations. We have come far enough down this road now that the burden of proof is no longer on open access advocates, it is on those who would claim that the traditional models of publishing and distribution are still workable.

# How to COPE

*Sat, 26 Nov 2011 06:13:05, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Recently I have had the opportunity to review the first 14 months of [Duke's COPE fund](#), and it has been an interesting exercise.

COPE, of course, is the Compact for Open Access Publishing Equity, a plan by which academic libraries create funds to help faculty authors pay the article processing fees (APCs) that some open access journals charge as a way to replace subscription fees. Duke established a modest COPE fund in October 2010, and it was re-funded for fiscal year 2011-12.

Now, at the end of November 2011, I find that in 14 months we have reimbursed open access publishing fees for 20 articles written by 18 faculty members. We have six more COPE applications waiting for completion. Assuming that all of them are completed and reimbursed, we will have exhausted the available funding for COPE for the first time.

The authors we have reimbursed are predominately, but not exclusively, scholars in the biomedical sciences. That group is evenly divided between medical school and University-side scientists, but faculty in diverse fields like environmental studies and evolutionary anthropology have also benefited from the fund. The largest group of articles we helped fund were published with journals from the Public Library of Science, followed by Hindawi, Frontiers in Research, and BioMed Central. All of them are, of course, peer-reviewed publications.

With a relatively new initiative like COPE, it is not entirely clear how success should be measured. Is it more successful to spend the entire COPE fund on a campus, or to have it go unused? The answer, I suppose, would depend on the reasons behind the use or non-use.

At Duke we have been very clear that the purpose of COPE is to provide incentives for new models of scholarly publishing and to support open access. As the fund administrator, I am convinced that there is a good deal more open access publishing amongst our faculty than I previously expected. These 25+ articles are very much only the tip of the iceberg. And I cannot say for sure that the COPE fund caused an increase in that type of publishing; I am inclined to think faculty are turning to open access because of its numerous benefits, and that COPE funding is not the strongest factor for most of them. I have been told by authors, however, that COPE is an important example of the University "putting its money where its mouth is," and I am pleased by that perception.

As open access publishing evolves, different funding models are being tried. It is important to recognize that author-side fees may not be the "winner" over time; many OA journals even now do not rely on such fees, although the best-known ones do. Nevertheless, we are clearly seeing an important transitional movement in scholarly publishing, and a COPE fund is one way for an institution to both encourage that transition and to tangibly affirm a commitment to open access for scholarship.

I expect that at Duke we will reexamine the policies and procedures we have in place for COPE, as we consider how it is to be re-funded, to see if they actually serve the incentive purposes behind the fund. In that task we will gain significant guidance from [this recent blog boost by Stuart Shieber](#) of Harvard University's Scholarly Communications Office, about how funding agencies should assume the task of paying open access article fees. Stuart's point about funders is important, and I hope that the policies he

recommends are widely adopted. But his post is also a cogent and compelling re-assertion of those incentive purposes that COPE is intend to serve and how different policy decisions relate to the overall goals. As such, it provides a helpful guide for anyone considering a COPE fund or considering how to make such a fund more effective.

# SOPA and the Constitution

*Mon, 12 Dec 2011 15:32:14, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]*

I have written before ([here](#) and [here](#)) about the bills now before Congress that go by the name of PROTECT IP in the Senate and SOPA (Stop Online Piracy Act) in the House of Representatives. There are many reasons why these are bad bills, and an [alternative approach](#) has recently been proposed. Since discussions about the flaws in these bills has [entered the mainstream media](#), I have not felt a strong need to continue to write about them. But I do think it is worthwhile to point readers to a [blog post by Professor Marvin Ammori](#) on the legal blog Balkinization about why he and Lawrence Tribe of Harvard have both written to Congress, independently, about the unconstitutionality of the bills. This is a different, and in many ways more fundamental, objection than those that I have seen elsewhere. Let's hope Congress is listening.

# What fair use is for

*Tue, 20 Dec 2011 08:38:53, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

When I [considered the Authors' Guild lawsuit](#) against the Hathi Trust and some of its partner institutions a couple of months ago, only the complaint had been filed, so it was natural to focus on the motivation of the plaintiffs. And those motives are not hard to discern; after tasting the possibility of monetizing orphan works through the Google Books settlement and then having it snatched away, the AG is looking for an alternate way to use litigation to carve a profit-making opportunity from the labors of others.

Now, however, answers to the suit have been filed, both by the named defendants and by a potential defendant.

The [defendants' answer](#), filed on Dec. 2, is a very lawyerly document, and for that reason it might disappoint some readers. There are no lofty assertions about public benefits and the purpose of fair use (I will make those assertions on their behalf). Instead, the defendants' answer does what it is required by the rules of federal civil procedure to do; it goes point-by-point through the complaint and, largely, admits the factual assertions while denying the conclusions of law. It also states quite baldly the defenses on which these parties intend to rely. We have a system called "notice pleading" in the U.S., and the defendants are only required to give notice to the court and the plaintiffs of the arguments they intend to make.

Nevertheless, we can see the broad outline of a response here. The plaintiff's complaint focused nearly exclusively on section 108 of the Copyright Act, the so-called "library exceptions" which deal with preservation and copying made for patrons (the foundation of inter-library loan). The plaintiffs want the court to conclude, it seems, that this one section of the law entirely encompasses all that a library is entitled to do with copyrighted material. As they go through the points alleged in the complaint, the defendants repeatedly assert that "Section 108 of the Copyright Act is one of many limitations on copyright holders' rights" and "that plaintiffs description of section 108 is incomplete and therefore mischaracterizes the statute." What is left out, of course, is that section 108 states explicitly that fair use — section 107 — is still available and that nothing in 108 "affects the right of fair use" (section 108 (f)(4)).

Fair use, which exists for the purpose of allowing exactly the activities that Hathi is designed for — research, teaching and scholarship — will naturally be the heart of this case, however badly the plaintiffs wish this were not so. But the defendants raise several other defenses as well, including sovereign immunity (since all but one of the defendants are public institution), the plaintiffs' lack of standing (since they cannot show that they or their members own most of the works at issue), the statute of limitations, and the fact that many of the works that the AG wants to impound are actually in the public domain. And, of course, these defendants assert fair use. In fact, they assert a whole slew of the exceptions that Congress built in to the copyright law. One of the places we will learn most from this case will be where the defense weaves together sections 107, 108, 109, 110 and 121 into, I imagine, a thicket of justification that emphasizes how comprehensively Congress intended to permit the socially beneficial uses that Hathi will facilitate.

The reference to section 121, which allows reproduction of copyrighted materials "for blind or other people with disabilities," took on added importance on Dec. 9, when the National Federation of the

Blind [filed a motion](#) asking the court to let it intervene as a defendant in the case. Such intervention is allowed in federal procedure “as a matter of right” when a party can show that it has a substantial and legally protectable interest in the matter at hand, that they could be harmed by a decision, and that their interests will not be adequately represented by the parties already involved.

Unlike the formal defendant’s answer, this document does make a full-blown argument, and it is a compelling one. The National Federation For the Blind tells several stories of university students and teachers whose ability to do their work is hampered by the laborious, and sometimes impossible, process of obtaining copies of works that can be read by a computer text-to-voice reader. They provide a vivid picture of how the Hathi Trust project “would allow blind students and faculty to participate fully in university life,” and that this has been a major purpose of the Trust since its inception.

The spare language of the one document, and the fully developed rhetoric of the other, combine to produce a convincing picture of what fair use and the other exceptions to the copyright monopoly were intended not merely to allow but to facilitate. Research, teaching, scholarship and access for persons with visual impairments. If copyright is allowed to impede the advancement of these purposes through mass digitization, and in the name of tying these files up until a private organization figures out a way to make money from them — to reap where they did not sow, as it were — then copyright law will have proved a failure indeed. But I do not believe that a court will allow that to happen.

# Using copyright for its intended purpose

*Wed, 28 Dec 2011 05:56:40, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: technologies]*

At its roots, copyright in the Anglo-American legal system is a statutory grant of rights intended to be an engine for innovation. Copyright and patent legislation is the only type of law whose authorization in the Constitution is specifically tied to a purpose — “to promote the progress of science and useful arts.” If copyright legislation does not serve this purpose it is, arguably, unconstitutional.

This is part of the real irony of SOPA, the bill currently being considered by the House of Representatives that would fundamentally alter how the Internet works in the U.S. in order to protect the traditional entertainment industries. Such a bill, which would kill innovation in the name of protectionism, [may be unconstitutional](#). That it is a bad idea is especially clear when we look at how other countries are considering adjusting their copyright laws precisely to better support innovation and economic growth.

In Brazil, a third draft of proposed copyright legislation has recently been released. As [Pedro Paranagua, a Brazilian copyright expert, tells us](#), there is both good and bad in the bill, but as I read his list of incorporated provisions, I am jealous of the attention being given to the real purpose of copyright, which is economic development through innovation. Exhaustion of rights, what we call first sale in the U.S., would be defined in a way to prevent the recent debacle in which Omega abused copyright, in my opinion, to suppress legitimate price competition for its watches. Collecting societies would be overseen by government watchdogs, and contract principles about serving the public interest and avoiding undue burdens would be explicitly incorporated into the copyright law. Compulsory licenses would be available for uses of orphan works, and creators would have the explicit ability to dedicate their work to the public domain. Finally, there is a proposed set of exceptions that covers at a lot of the socially beneficial uses that are still unreasonably controversial in the U.S.

Even one of the things that Pedro is nervous about, ISP liability under a notice and take down scheme, seems like a good idea that the U.S. must fight to maintain. The notice and take-down system under the DMCA has allowed a lot of innovative businesses to thrive (YouTube being the most prominent), and that system is under severe threat if the provisions of SOPA get enacted. So while Paranagua worries about a DMCA-style regime in Brazil, I am desperately hoping that we can keep that regime in place in the U.S.

Brazil has also been at the forefront of the World Intellectual Property Organizations discussion of limitations and exceptions. The [resulting WIPO agenda](#), looking primarily at exceptions for libraries and for access for persons with disabilities, reflects many of the ideas mention above, including cross-border uses (the subject of first sale and the Costco dispute), a solution to the problem of orphan works, and the relationship between copyright law and private contracts.

This last issue brings me to the most detailed document I have been looking at recently, the “Consultation on Copyright” released by the British government. The UK has undertaken a thorough review of their copyright law in the past couple of years, explicitly to address the places where copyright interferes with innovation rather than fostering it. The consultation is seeking hard data about the impact of the changes that were proposed by the commission it set up, called the Hargreaves Commission. Many of the provisions are similar to the ones I have already mentioned. But here is the language the really caught my eye:



The Government agrees that, where a copyright exception has been established in UK law in order to serve certain public purposes, restrictions should not be re-imposed by other means, such as contractual terms, in such ways as to undermine the benefits of the exception.

Although contract terms that purport to limit existing exceptions are widespread, it is far from clear whether such terms are enforceable under current contract law. Making it clear that every exception can be used to its fullest extent without being restricted by contract will introduce legal and practical certainty for those who rely on them.

I have argued in the past that contracts should not be allowed to preempt copyright's limitations and exceptions, at least in cases where the contract at issue is not subject to "arms length" negotiation. Here the Conservative government seems to be embracing that position (not because I suggested it, of course, but because the Hargreaves commission did) and even carrying it further. Recognizing that copyright exists to serve a public purpose, and that that purpose should not be undermined by one-sided private agreement, such a "click-through" contracts on websites, would be an important step toward providing the consistency and certainty that all law-making aims for.

The point of this very quick and cursory survey of international proposals for copyright reform is simple. Throughout the world, even in those countries that, unlike the U.S., embrace a natural-rights account of copyright, reform is focused on supporting innovation and not allowing a system that worked in the past become an obstacle for the future. Yet in the U.S. all of our copyright proposals, and [even statements from our Registrar of Copyrights](#), seem focused on protecting the old ways and staving off as long as possible the innovation that provides our best economic hope. If we cannot learn from our competitors and our trading partners, we will certainly be left behind.

# Breaking technology

Thu, 05 Jan 2012 11:02:17, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing, category: technologies]

In the past few weeks I have seen several news reports and other actions that seem to form a pattern, where the traditional publishing industry has set out to break digital technologies in order to preserve their traditional business models.

Of course, the most radical effort to break the Internet so that it does not threaten the legacy content industries is the Stop Online Piracy Act, about which much has been written. I was disheartened by the plausible suggestion that the decision to suspend the House's hearings on SOPA last year and renew a push for it in 2012 was not due to real objections but was merely a ploy to solicit more donations from the movie and recording industries. Unfortunately, this is often the way the legislative "sausage-making" process works. But I want to look at some other attempts to hobble digital technologies that strike closer to the publishing that is the most common form of dissemination on our campuses.

On Christmas Day the *New York Times* ran this [story about the "tug of war" between publishers and libraries over e-books](#). The writer is very sympathetic to publishers' efforts to maintain exactly the revenue streams they have been accustomed to in the pre-digital era, but what struck me most is the language used. Repeatedly the article talks about "inconvenience" and "friction," stressing that "borrowing an e-book... has been too easy." As the author says "to keep their overall revenue from taking a hit... publishers need to reintroduce more inconvenience for the borrower." [This librarian commentator](#) makes the key point: it isn't that the technology does not work, but that publishers do not want it to work as well as it does. They want to break the technology that is available, so that user experiences are less seamless. They only see a role for themselves if they can offer assistance overcoming inconveniences that they have introduced in the first place! And perhaps they are right about that.

Another example of this failure to do what digital technologies allows you to do can be found in [this article](#) from the *Chronicle of Higher Education*, which reports on a study about textbook choices that found that e-textbooks offered little savings. The problem, the authors acknowledge, is not the technology but "publisher pricing decisions." It seems we cannot really take advantage of the benefits offered by these new technologies until we free ourselves of ties to publishers who cannot imagine any other way of doing business than the way, and at the price, that it always has been done.

Last week *Bloomberg News* [reported on a lawsuit](#) brought by HarperCollins to prevent the publication of an apparently unauthorized e-version of a popular children's book. The suit will turn on the language of the contract between the author and HarperCollins, about which I cannot comment. But it is striking to me that the publisher is not complaining about competition with their own e-version of the book because they do not offer one. They simply want to stop anyone else from creating an e-book unless and until they figure it out (presumably when they decide how to introduce sufficient inconvenience). They may have the legal right to do that, but they are clearly not interested in responding to consumer demand. Indeed, it seems that the author of the book is interested in providing a digital version, but the publisher has told her that they have that right and she does not. The lesson is that authors who do not want their readers to be burdened with artificial inconvenience should negotiate more carefully with their publishers. It may often be in the best interests of authors to withhold the right to offer an electronic version of the work in an initial publication agreement and consider seeking another platform or publisher, one perhaps less wedded to inconvenience, for the e-book version.

This, of course, is a process increasingly familiar to academic authors. For years scholarly authors of journal articles have engaged in a tug-of-war with publishers over how best to exploit digital technology to serve the best interests of scholars and scholarship, rather than just the profit motives of publishers. Once again the publishing community has resorted to legislative attempts to try to dictate what scholarly authors can and cannot do with their own copyrights. Over the holidays the “Copyright in Research Works act,” a re-tread from the last legislative session, was [introduced again](#). The bill would reverse public access programs like that of the National Institute of Health and make other such programs illegal, essentially telling taxpayers that they have to pay twice to see the research they have funded. The publishers are clearly asking Congress to break the Internet legislatively so that their toll-access sites are the only source for scholarly information.

What I find most astonishing is the immediate [expression of support for the bill](#) that came from the Association of American Publishers, and this sentence in particular:

The Research Works Act will prohibit federal agencies from unauthorized free public dissemination of journal articles that report on research which, to some degree, has been federally-funded but is produced and published by private sector publishers receiving no such funding.

I am stunned by the audacity of the claim that research articles are “produced” by private sector publishers! I think the producers of these works are sitting at desks and labs scattered around my campus, and thousands of other college and university campuses. They are not paid by publishers either to do the research or to write their articles. And I do not believe that the journals that publish those articles [actually add any copyrightable expression](#) to what has been written and revised by our faculty members. If they do, the scholarly authors have a right to complain, since such additions without the author’s cooperation would compromise the integrity of the scholarly record.

We cannot say it often enough. The intellectual work for scholarly publications is done by academics, not publishers. They own the copyright in those works up until they are asked to transfer it to the publisher as a condition of publication. And if publishers persist in interfering with that copyright ownership and insisting that scholars cannot take advantage of the tremendous opportunities that digital technologies offer, the solution is to stop giving them those copyrights.

# Tinkering with Article III

*Wed, 11 Jan 2012 09:00:16, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

Article III of the United States Constitution creates the Supreme Court and provides the skeletal framework for the federal courts system, which Congress is invited to flesh out. [Section 1338 of Title 28](#) of the United States Code establishes that the federal district courts are to have “original jurisdiction” over all civil actions arising from the copyright law, and in [section 301](#) the Copyright Act explicitly preempts state laws regarding equivalent rights.

At least some of this structure would need to change if the Copyright Office goes forward with a proposal to create a kind of small claims court system to adjudicate copyright infringement cases. In 2006 the Copyright office first created a [report raising this possibility](#), and it is currently [seeking public comments](#) about the feasibility of suggesting such a move to Congress.

The origin of the suggestion is the concern that it has become so expensive to pursue a claim in the federal courts. Access to the courts for those of limited means (which of us isn’t?) is an ongoing issue, and the Copyright Office is to be commended for taking on this difficult problem. But the report on which the public is invited to comment is a very strange document; a model of equivocation and “yes, but” statements.

The most striking thing about the report, which seems to have been a sidebar to the 2006 study of Orphan Works, is how completely it represents the point of view of rights holders and gives scant attention to the concerns of potential defendants and to the public interest. [Photographers especially](#), it seems, complained that the federal courts were too costly, and the report seems to adopt their arguments wholesale, and then pauses occasionally to note qualifications and objections to those arguments.

The most obvious example of this qualified one-sidedness is found in two paragraphs on the second page. In the first, the Copyright Office says that it “expresses no definitive view on the extent to which the current system hinders the ability of authors and copyright holders to pursue small infringement claims.” But it immediately goes to assert that it is “clear” that there are “serious questions about the effectiveness of the current system.” I have no problem with that at all; it is probably correct. Where I do have a problem is in the next paragraph, about defendants:

Some have also asserted that the existing system for adjudication of copyright infringement claims can in some cases be too burdensome for defendants who are accused of infringement. While it is not difficult to imagine that a wealthy plaintiff in a copyright infringement suit could make the litigation very costly for a defendant of modest means, the Office is not aware whether this has in fact been a significant problem.

Really? The Office is not aware of a problem for defendants with the high cost of defending an accusation of infringement? I wonder where they have been. Surely the RIAA tactic of sending out “settlement letters” asking for a few thousand dollars from accused file-sharers is premised on the idea that many people will be too frightened or too poor to defend themselves in the federal courts. And the company Righthaven, which seems to be in its death throes, built a business model on suing small

bloggers and the like in the obvious expectation that most of them would not have the means to defend themselves.

In fairness, the Copyright Office report does note what seems to me to be an important argument against a small claims system. The Copyright Act already has built-in the answer for plaintiffs who are intimidated by costs. The statutory damages, which are excessively high (up to \$150,000 per act of infringement), clearly are intended to help plaintiffs overcome the expense of litigation, especially since they obviate the necessity of proving actual damages. Also, the Copyright Act explicitly allows the prevailing party to ask the court to assess attorney's fees and costs to the other side. While the Office notes that these facts might make a new system unnecessary even for plaintiffs with small claims, it again fails to address the question from the other side, that of the defendant.

If there were a small claims court system (state courts, or an entirely new federal tribunal?), would it be empowered to award the same level of statutory damages? If so, the system would merely provide potential plaintiffs with a cheaper weapon for intimidating defendants into settling early to avoid a grotesquely large potential loss. Only if statutory damages were reduced or eliminated at the small claims level, and if potential awards of attorney's fees were capped, could the system be equitable for both potential plaintiffs and defendants.

Perhaps the most troublesome aspect of implementing a small claims system for copyright infringement suits is the issue of how fair use would be handled. The artists' blog linked above raises this question, since small artists are often on both sides of copyright complaints. Fair use, they note, is very fact specific and depends on both a minute analysis of the particular circumstances and a thorough knowledge of judicial precedent, which is where courts learn how to understand a situation through the prism of the fair use factors. If copyright infringement claims were heard by a small claims system, it is doubtful that the judges would have the needed expertise, or the resources to obtain it. My biggest fear out of such a system is that it would be even harder than it now is to convince a tribunal that fair use is a central aspect of the copyright scheme that needs serious consideration and not merely a defense to be examined and dismissed in a cursory fashion (as already happens too often).

I am not convinced that a small claims system for copyright is necessary, but I am not firmly against such a system either. Most important, it seems to me, is being certain that the judicial structures we put in place do not intensify the chilling effects on socially beneficial uses that are already one of copyright's biggest problems.

# An interesting experiment

*Tue, 17 Jan 2012 07:47:19, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The announcement from JSTOR of their new “Register & Read” program, reported [here in Inside Higher Ed](#) and [here in The Chronicle of Higher Education](#), seems like a promising experiment. It deserves both praise and a couple of caveats, I think.

The first caveat is that it may be a rather small experiment; only 5 of the 50 University of Chicago Press journals, for example, will be available through Register & Read. The success of the experiment in teaching JSTOR about its potential readership that does not have subscription access may be limited if the size of the sample available is too small, or if the disciplinary focus of what can be read is not broad.

The second important caveat is that this is not an experiment in open access. Allowing unsubscribed readers “read only” access to three articles from a limited archive every two weeks is nice, and addresses one aspect of the overall access problem. But it leaves a great deal of that problem untouched.

For example, the Inside Higher Ed piece mentions Aaron Swartz and his apparent attempt to hack JSTOR and download millions of articles. Some have claimed that Swartz was attempting to collect these articles for “non-consumptive” text-mining research. I have no idea if that is true or not, and I disapprove of his methods even if it is. But the access JSTOR will permit through Register & Read does not begin to address the opportunity for cross-journal research into the characteristics of scholarly output that text-mining offers. It does not even meet real research needs for academics at under-resourced institutions, since the scope and number of articles is so limited. At best, and it is a step in the right direction, this program will support one-off research needs and “curiosity” reading.

Nevertheless, there are several things to like about this program. Most important from my point of view is the recognition it implies of the unexpected reader. Too many publishers and database vendors have denied for years that there is an access problem at all; that there are readers out there who would like to read articles in JSTOR and elsewhere but cannot do so because they are not affiliated with a subscribing institution. One can just read the [AAP’s recent statement](#) of support for the Research Works Act to find such a fantastical denial. JSTOR, however, is implicitly acknowledging those potential readers with this new program. In fact, the Inside High Ed article actually makes reference to the “droves of unlikely visitors” directed to databases like JSTOR by Web search engines. They are certainly out there, their presence supports most of the strongest arguments for open access, and it is good to see JSTOR acknowledge them.

More than simply acknowledging these unexpected, unsubscribed readers, JSTOR wants to know who they are. That is the point of registering before one can read under this new program. JSTOR will collect data to see if individual subscriptions or, one hopes, reasonably priced purchases of individual articles, are possible. It seems to me that a key element for the future survival of the traditional publishing industry is finding realistic price points for these services; the \$39.95 charge that we often encounter today is simply wishful thinking, perhaps intended by publishers to convince themselves that individual sales are impractical more than to actually open that market. If JSTOR can gather data that will undercut this willful blindness and really begin a discussion of practical access for individuals or non-subscribing institutions, that would be welcome.

I have to note that a colleague suggested to me last week that registration might be a barrier for many people. For myself, I hope potential users will not see it that way. The information JSTOR will apparently seek is relatively modest I think, at least compared to what Apple and Amazon and Netflix already know about me! And JSTOR has been a rather trustworthy partner over time for academic libraries. What's more, helping them learn exactly who the folks are that they are currently not serving can have very beneficial consequences. So even though this is a very modest experiment in access for the under-resourced, I hope individuals will use it and help JSTOR better understand their future business models.

# Losing our focus

*Wed, 18 Jan 2012 15:16:15, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: public-domain, category: technologies]*

Today the Supreme Court issued a decision in the case of *Golan v. Holder* which is a significant defeat, I think, for the public domain in the United States. Reading the opinion has made me wonder if we have really strayed from our fundamental commitments about intellectual property.

The case involved the complex and technical issue of restored copyrights in foreign works — works that were originally created and published abroad. As part of the U.S.'s decision to join the Berne Convention and other international treaties on intellectual property, Congress enacted an amendment to the Copyright Act, now found in section 104A, that restored copyright in foreign works that had risen into the public domain in the U.S. but were still protected in their countries of origin. The effect was to remove works from the public domain after they had already lawfully become the property of every U.S. citizen. Several groups, including musicians, publishers and others who had relied on the ability to freely exploit these public domain works, brought a lawsuit to challenge the constitutionality of this unprecedented alteration in the terms of the copyright bargain.

Those groups lost today. Six Justice of the Court found that the “Uruguay Round Agreements Act,” which enacted this restoration of copyrights, neither exceeded Congressional authority under the copyright and patent clause of the Constitution nor created a conflict with the guarantee of free expression found in the First Amendment. The [full decision can be found here](#), and there is a [brief report from the Chronicle of Higher Education](#) as well. For me, several recent readings and discussions provided a context as I read the decision.

Last night my colleague Will Cross and I were teaching a class session on copyright for library students. Will discussed (among other things) two aspects or principles of copyright decision making that seem relevant to today's decision. First was the idea that the federal courts tend to show great deference to Congress in the area of copyright. That deference is very evident in today's majority opinion: “This Court has no warrant to reject Congress' rational judgment that exemplary adherence to Berne would serve the objectives of the Copyright Clause.”

The other principle Will discussed was the incentive purpose that is given as the reason, in the Constitution, for allowing Congress to enact intellectual property laws. This purpose is pretty clearly rejected by the majority, when Justice Ginsberg writes that “Nothing in the text or history of the Copyright Clause, moreover, confines the ‘Progress of Science’ exclusively to ‘incentives for creation.’” It is hard to see how else that clause can be read, and Justice Breyer, in his dissent, provides a compelling account of why the U.S. enacted copyright in the first place, and why it is supposed to be limited. He goes on to note that “The statute before us, however, does not encourage anyone to produce a single new work.”

It seems clear to me, as it does to Justice Breyer, that the wording of the Constitution's Copyright Clause was to restrain Congress and direct that laws serve a specific purpose. The majority of the current Court, however, does not see it that way. We really have opposing visions of copyright law at work here, and the deference to any Congressional enactment, no matter how one-sided and counter-productive to new creativity, has made the Constitutional language increasingly ineffective. It is one of those situations where we must hope that, over time, the persuasiveness of the dissent will eventually move it to be the majority view.



I recently read an article from 1890 on [“The Evolution of Copyright”](#) by Brander Matthews. It was written just as the Berne Convention was being formed, and its intent was to commend the new international organization to U.S. lawmakers. Matthews is clear about how much the Berne approach, modeled on the French “natural rights” view of copyright as it is, differs from the approach taken in England and the U.S. Clearly he hopes the U.S will change course. For nearly a hundred years that did not happen, but perhaps now we are seeing, unfortunately in my view, the steady erosion of the instrumentalist view of copyright that has prevailed in the U.S. for some time, and is enshrined in our Constitution, in favor of a natural rights approach that favors those who already own rights even when that favoritism disadvantages those who would create new works.

To slightly change focus, however, I want to end with one note of optimism. The past couple of weeks has seen, in my opinion, a remarkable awakening of public interest in copyright and access issues, sparked by a couple of unfortunate pieces of legislation. There has been a [lead article about open science](#) in the New York Times, and the [24 hour shut down](#) of Wikipedia in protest over one of these bills — the Stop Online Piracy Act — has made digital copyright a topic of national discussion. The web site PopVox has set up a [central site for comments and advocacy](#) against the other bill, called the Research Works Act and designed to undermine efforts toward public access for publicly-funded research. With all this attention, it is still possible to hope that public pressure, and especially concern over the functioning of the Internet, will begin to turn our national focus back toward that instrumental and incentive-based view of copyright.

# Who do you work for, faculty author?

*Wed, 25 Jan 2012 08:48:53, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

In two recent blog posts, [one describing the original dilemma](#) and one [his decision about it](#), Professor Steven Shavero discusses his experiences trying to publish an essay in a collection that was being prepared by Oxford University Press. He balked at the contract he was offered, and ultimately decided not to publish in the collection, over the contractual term that would have defined his essay as “a work made for hire.” This seems like a new development in the ongoing conflict between publishers seeking ever more control over the works they are given by academics and professors who want to get proper respect and impact from their works.

There is something particularly galling for a scholar about having her article described as “work for hire.” It implies a lack of academic freedom and even a “hired pen” approach to scholarship. Most universities, which actually might have a strong case if they claimed faculty works as “works made for hire,” long since decided that the obvious ill-will and hassle that would attend such claims made them unpalatable. OUP, on the other hand, does not seem to have learned the same lesson or, in fact, to even understand the law correctly.

I have to say first that I do not know how widespread this practice is, even within OUP. This is the first time I have heard of this situation. It may apply only to essays written for inclusion in collected, thematic volumes. Or it may just be a test foray into a really bad idea.

By way of introduction, it is important to note that there are two ways for a work to be a work for hire. First, it can be a work created by a regular employee within the scope of his or her employment. That definition could likely fit faculty writings, but it has almost never been used to contest faculty ownership. Alternatively, a work by an independent contractor — someone who is not a regular employee — can be a work for hire if two conditions are met. First, the work must fall into one of nine categories enumerated in the law. And second, there must be an express, written and signed agreement between the employer and the contractor “that the work shall be considered a work made for hire.”

OUP obviously hopes to take advantage of the second path to work for hire, since the first one would not apply. A “contribution to a collective work” is one of the permissible categories for independently contracted works made for hire. But I think OUP has a big problem meeting the second requirement.

It is important to note also that the effect of work for hire is the same in either situation — the employer is designated the “author” from the moment the work is created. The person who actually puts pen to paper, as it were, has no rights at all in the work. That fact probably explains some about why OUP would make this foolish move, and it is also part of the reason why their attempt to turn faculty writings into work for hire is likely to fail.

As to why OUP would do this, I think there are a couple of legal benefits for authors that OUP hopes to avoid having their contributors enjoy. One would be the termination right, which allows an author or other creator to terminate a transfer of copyright after thirty-five years, regardless of the terms of the original contract. This right, while it may seem obscure, has recently gotten attention as the legal window through which composers and performers of profitable music from the late 1970’s has just opened. The one way to prevent an author from terminating a transfer of rights is to own the work as a

work for hire, so that no transfer was ever required. I suspect some legal beagle at OUP saw the controversies over music and thought this might be a good idea. It is not.

The other thing that having these contributions classified as work for hire would prevent would be prior licenses. As more faculties adopt open access policies, which usually take the form of a prior license to the institution for repository deposit, the possibility arises of an eventual contest between a prior license contained in such a policy and a later transfer of the copyright through a publication contract. OUP may be test-driving an idea for avoiding that situation — if the faculty author is classified as a non-author by the work for hire doctrine, they would be unable to grant any prior licenses, since they never held any rights.

So why do I think this move is stupid, and doomed to fail? Three reasons.

First, nothing is more surely designed to make faculty authors angry than to tell them they are not the authors of the scholarship they offer to publishers. As a group, faculty authors have been pretty docile toward publishers for a long time, but foolish and tone-deaf moves by publishers have begun to stir faculty anger toward presses they once considered friends and colleagues. If a claim like this, which denies the fundamental dignity of authorship to scholars, becomes widespread, that slow rebellion will speed up very quickly.

Second, in the work for hire battle, presses are likely to lose. As I said above, universities could, if they choose, assert a convincing case that faculty are regular employees whose writings are created within the scope of their employment. Were OUP really to assert its WFH claim to defeat a prior license, the institution could claim that, as the regular employer of the scholar, *it* was the author and so the agreement with OUP would be void as outside the ability of the faculty member to sign.

Finally, and most importantly, there are two cases in the U.S. courts that have held that, in an independent contractor situation, an agreement designating the work as a work made for hire must be signed, or at least formed (meaning that both parties understood), prior to the creation of the work. There is an excellent [discussion of those cases](#) on the website of copyright attorney Ivan Hoffman. By making the work for hire provision part of a submission agreement, OUP would be unable to show that such an agreement would even have been contemplated by the author, much less agreed to. So this is a move which can only have negative consequences for OUP. The cost in bad feeling is very high, and it cannot, I don't think, succeed as a legal maneuver, even if OUP thinks it is worth that high cost.

# Why boycott Elsevier?

*Tue, 31 Jan 2012 09:24:11, ksmithl2@duke.edu, [category: authors-rights, category: licensing, category: scholarly-publishing, category: technologies]*

The snowballing [petition on which scholars pledge to boycott Elsevier](#) is gaining a good deal of attention. There is an [article in today's Chronicle of Higher Education](#), and this more [general article about the future of Elsevier's business model from Forbes](#). As of today the boycott pledge has over 2100 signatures.

As the Chronicle article points out, the petition lists three “charges” against Elsevier: their extremely high prices, the practice of “bundling” so that institutions have to buy journals they do not want in order to get the ones they do and hence have less money to buy other things, and corporate support for the Research Works Act and other legislation that would threaten the free flow of information.

While I agree that all of these things are significant problems in the current scholarly communications environment, I have to say that Elsevier is not the only “sinner” guilty of these infractions, or necessarily even the most culpable among commercial publishers. This does not mean I am particularly sympathetic to Elsevier, and I am glad to see the petition for a couple of reasons.

First, the boycott movement is coming from scholars themselves. It is not simply a matter of radical militant librarians (some of my favorite people, btw) who are upset about high prices. This petition represents a growing awareness amongst scholarly authors that traditional publication models not only are no longer the only option, but in fact may be bad choices for those concerned with the overall dissemination of knowledge. It is simply becoming clearer to many scholars that the values they hold are not the same as the ones that commercial publishers are pursuing.

Second, when framed as a divergence of values it is much easier to see that the core issue in this movement is who will control the changing course of scholarly communications and the scholarly record. It seems less and less acceptable to trust commercial publishers with the responsibility for scholarship now that we no longer will be dependent on the printed artifacts they created. As scholarship becomes digital, we are quite rightly seeking new models of control that serve the needs of scholars first, regardless of the business models that may thereby be left behind.

One of the reasons I do not believe in the “abolish copyright” movement is because I think the control over how a work is disseminated and used by others will continue to remain important to scholarly authors. Copyright desperately needs reform (or else it needs more scholarly authors who use Creative Commons licenses to leverage their economic rights to protect things like attribution, which actually matter to academics) but it is not likely to become irrelevant in the digital environment. Instead, scholars will seek new ways to use the rights that vest in them (not their publishers) to control their works in ways that best serve their own needs and the interests of their particular discipline. Boycotting Elsevier may not bring about that revolution by itself, but it is a step toward demanding that the rights and concerns of scholarly authors themselves actually drive decisions about how scholarship is shared in the digital environment.

# Fair Use ferment

*Thu, 02 Feb 2012 10:42:04, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

There is a lot happening in fair use these days, even as we are still waiting for a decision in the Georgia State copyright infringement v. fair use case.

One of the realities of modern political campaigning is that candidates like to use popular music or other material to increase the energy and appeal of campaign events or advertisements. And they often do so without authorization, causing some content owners to complain. The Republican primary this year offers two examples, the comparison of which is instructive. First, [Mitt Romney ran ads](#) using a short clip of Tom Brokaw reporting, on NBC News back in 1997, about Newt Gingrich being disciplined by the House of Representatives. NBC and Brokaw complained, and the Romney camp explicitly invoked fair use as their defense. Then on Tuesday came reports that a [lawsuit has been filed](#) against Newt Gingrich for unauthorized performances of the song “Eye of the Tiger” (the theme from Rocky III) at campaign events. I have not yet seen any response from the Gingrich camp about the lawsuit, but I have to say I think Romney’s use is more defensible as a fair use than is Gingrich’s.

The news clip Romney used is a straightforward, factual report of an action taken by the U.S. Congress. So the use of the news item does seem like fair use. And Tom Brokaw may be a celebrity, but his publicity right surely cannot extend to suppress news reports if they are repeated in contexts he does not like; the messenger should not be allowed that kind of control over the message, when the message is a matter of public interest.

On the other hand, Gingrich’s use of the Rocky song is just to amp up the energy at rallies and deliver a general “comeback” message. It is not educational, transformative, or, in itself, a matter of public interest. It is precisely the kind of use for which a license could have, and probably should have, been sought.

More relevant to fair use in educational contexts is the [recent opinion from the General Counsel of the U.S. Patent and Trademark Office](#) addressing the question of whether it is fair use for patent examiners to provide unauthorized copies of research articles to patent applicants during the examination process. There are a lot of parallels here to the distribution of course readings to students enrolled in a particular course, so I expected an equivocal opinion. But the USPTO finds that this practice is clearly fair use, and argues that three of the fair use factors favor that finding, while the remaining factor, amount, is neutral, even though entire works, assuming a journal article is the entire work for fair use purposes, are at least sometimes distributed to applicants. Even more surprising, the PTO rejects consideration of a licensing market when analyzing the fourth factor, finding that such a market for the PTO’s use is not “cognizable” (even though I am sure the CCC would be willing to sell such licenses). This ruling could be an interesting precedent for academic cases; I hope it is brought to Judge Evans’ attention in the GSU case. Can universities likewise argue that they too can ignore the availability of licenses when making a fair use determination about course readings?

It is worth noting that the PTO opinion puts a lot of stress on the “noncommercial, governmental purpose” of the use. I am not disputing the value of that purpose at all, but I would point out that section 107 of the Copyright Act does not mention “governmental” use as one of its exemplars of fair use. On the other hand, five of the six exemplars — criticism, comment, teaching, research and

scholarship — are clearly educational uses. If the PTO thinks they have a good case for fair use, isn't ours even stronger?

Last, but very far from least, is the release this past week of the [Code of Best Practices in Fair Use for Academic and Research Libraries](#). The Code represents a long process of consultation with librarians to determine what they think are best practices around core library functions. It is a "practice community" document, rather than a set of negotiated guidelines. One of the best descriptions of the Code is [this one from University of Minnesota "Copyright Librarian" Nancy Sims](#).

I won't repeat Nancy's excellent points about the Code here, except to make two small comments.

First, the Code is not legal advice. Although I was part of a group of lawyers who reviewed the drafts, we never declared that all the practices outlined were absolutely fair use or entirely without risk for the very simple reason that fair use does not work that way. The Code is designed to facilitate careful thought about specific situations in libraries and consideration of relevant practices. It should help libraries maintain a balanced view of how fair use works in our profession, but it is not a bright line rule or final arbiter.

Second, the eight principles should always be read with the limitations and enhancements that accompany them in the Code. This too is a reflection of what the Code is about — deep reflection about how to responsibly provide our core services. The librarians who participated in the development of the Code (including Nancy) provided a wonderful framework for good decision making, and it would be a disservice to them not to take the whole framework seriously. There are no shortcuts in fair use, but there are some very helpful sign posts, including this new Code.

# Grasping at straws

*Tue, 14 Feb 2012 09:06:28, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

Last week, “Inside Higher Ed” ran an [article about the release by the White House of all the comments](#) submitted to the Office of Science and Technology Policy in response to their request for information about public access to federally-funded research. I was gratified to see that they chose to quote from the comments submitted by the Duke University Libraries. But I was also appalled when I read the quote from comments submitted by the publisher Wiley Blackwell in response to the question about appropriate embargo periods for public access. The Wiley official wrote that “Any embargo period is a dramatic shortening of the period of copyright protection afforded all publishers.”

This statement strikes me as deliberately misleading. Publishers are not afforded **any** period of copyright protection by the copyright law, anymore than plumbers or ophthalmologist are. This kind of misinformation is intended to create the illusion that publishers’ business models are somehow favored by federal law and thus inviolate, but that is not true. Only one group is afforded copyright protection and the term for which that protection lasts — authors (under section 201(a) of the copyright law, Title 17 of the U.S. code). If publishers hold any rights, they hold those rights only because they are transferred to them by the authors whose works they publish. And if those authors choose, they can transfer less than the full copyright, and for less than the full term of protection.

Increasingly the transfer of copyright to publishers in exchange for using their distribution networks seems like a very bad bargain indeed. As the [ongoing boycott](#) of Elsevier dramatically indicates, scholarly authors are becoming much more vocal and open as they demand a better solution for distributing their works. It has always been problematic to give away the rights under copyright for free to publishers who then sold the works at a high profit, in which authors did not share. Now there are many other options available to authors, many of which publishers are anxiously trying to undermine. It is very important to some publishers that authors do not come to understand the power they have based on the fact that they hold all of the rights under copyright and can leverage those rights to do what is best for them.

Statements like the one from Wiley Blackwell reflect, I think, an increasing sense of panic in the publishing community. Disinformation is seen as one way to fight the growing realization that they may become as irrelevant in the Internet age as blacksmith and buggy whip makers became in the age of the automobile.

We see this sense of panic manifest in several ways. When Oxford University Press tries to claim that essays written for edited volumes are “work made for hire,” they are grasping at a legal straw that cannot hold up for them. Likewise when publishers like Elsevier and the American Chemical Society write publication contracts that try to make authors’ retention of rights, or not, dependent on the kinds of internal policies that exist on the authors’ university campuses. Such contracts are more cries of anger and fear than legal agreements. In all of these cases, the publishers are looking for a legal lever they can push that will stave off irrelevance. But the law does not work that way in general, and copyright is written to benefit authors and give them control over their works, not to prop up a particular business model.

Companies that survive are those that adapt to technological change, not those that desperately try to use legal coercion to prevent the change. The movie industry learned this when their attempt to prevent home video recording failed; they were forced to adapt, and they found new ways to flourish.

Instead of resisting public access to taxpayer-funded research and writing byzantine contract language intend to punish authors who seek to exploit their legal rights, publishers need to look at how they can provide services to authors that will be necessary and desirable in the digital environment for scholarship. Last month I had lunch with an official of a major publisher who talked about this approach to his business and was full of creative ideas. Unfortunately, he is still a minority voice. But misrepresenting the state of the copyright law is not the future for the publishing industry; services for authors is the future. It is time for publishers to stop grasping at straws, for authors to stop giving away all of their rights under copyright, and for both groups to work together to figure out what the future of scholarship is going to look like.



# What were they thinking?

*Fri, 17 Feb 2012 09:45:19, ksmithl2@duke.edu, [category: authors-rights, category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: scholarly-publishing]*

When the Chronicle of Higher Education ran [this story about the relatively new intellectual property policy at the University of Louisiana](#), one of my colleagues reacted with the question in my title. It is a valid thing to ask — how did the University system think this was going to go when they drafted the new policy? The same forces that presumably led to revision of the policy in the first place — increasingly various and potentially profitable work created for the online environment — will also lead faculty authors and creators to pay more attention to IP policies.

It seems the university system has been surprised by the opposition the policy has generated, but such surprise speaks poorly of their awareness of the realities on their own campuses. I am reminded of the surprise that content industries have expressed at the opposition to the Stop Online Piracy Act or the European dissent over ACTA. What, exactly, did they expect? The days when no one pays attention to such policies are past, and that is a very good thing.

The works created by faculty raise a complicated situation in a couple of ways, and need to be treated differently than works created by employees in a corporate environment. For one thing, there is the issue of academic freedom. Although the copyright law could well support the claim that all faculty works, even traditional scholarship like journal articles and books, are work for hire, the case would be much more complicated than the university system seems to imagine. As I say, academic freedom would pose a unique obstacle, since [courts have recognized a First Amendment interest in academic freedom](#). So there is a constitutional argument could be used to counter a work for hire claim at a public university. Also, there would be an argument over the traditional “teacher exception” that courts recognized for many years. Although there have been no decisions definitively invoking the teaching exception since the 1976 Copyright Act took effect, it would still provide a line of defense against work for hire claims that the universities would struggle to overcome ([this article](#) by one of the scholars quoted in the article explains this ambiguous situation).

Then, of course, there are the practical problems. Having a policy like this is sure to make it harder for the universities in the Louisiana system to recruit top faculty. Even if individual campuses modify the policy into something wholly different than the system-wide template, which they would be wise to do, the question will always hang over recruitment, and the balance of decision-making may be tilted in some cases involving highly productive and savvy professors. On the university side, the mountain of paperwork they will create for themselves if they really undertake to review every contract for publication seems not to have occurred to the drafters. But any small additional profit they could hope to make by claiming a portion of royalties is sure to be devoured by increased administrative costs.

As I read the article, I was struck by the sense that the university system was trying to create a single policy that would treat patented works and those subject to copyright in the same way. Any superficial sense that this might seem to make is easily dispelled, however; there are good reasons to deal differently with these two varieties of intellectual property. Copyright, for one thing, is easy and cheap to get. It is, in fact, automatic whenever original expression is fixed in tangible form. There is no need for the university employer to intervene to help the employee creator protect her rights. With patents, the situation is wholly different. Patents are difficult to get and it usually requires an investment of tens of thousands of dollars to successfully “prosecute” a patent. And patents, when they generate a profit (which few actually do), offer much larger gains. So creators need more help from the

university to get a patent, and universities have a greater incentive to provide that assistance, than is the case with copyright.

Also, the “significant use of university resources” is really quite different with copyrighted materials than it is with patents. Often the resources employed to create something subject to copyright are resource the university would supply in any case — a library, computers in faculty offices, art supplies for artists who both create and teach, a video camera in a dance studio, etc. Resources used in equipping labs to pursue patentable inventions, on the other hand, are often extremely specialized and sometimes costs millions of dollars.

This does not mean that the copyrighted productions of a faculty are less important than those subject to patents; their very ubiquity testifies to how vital such works are to the tasks of teaching and research. But the conditions of creation are so different that policies that conflate the two are seriously misguided.

One point I try to make whenever I discuss copyright ownership policies on university campuses is that such policies should distinguish between ownership of the underlying rights and uses that other parts of a scholarly community can be licensed to make. For example, a university need not claim ownership over the design of an online course by a faculty member as long as it assures, by policy or by separate agreement, that it has a perpetual license to use that courseware. Thus the faculty member’s academic freedom and reasonable expectation to own her own work is upheld, but the university does not have to worry about having to redesign the course if the faculty member leaves or to pay her twice for it. The designer, of course, is also able to reuse her work at a new institution, so everyone’s needs can be met. A careful policy on copyright ownership should be a kind of matrix that identifies types of works and groups of users who might have an interest in those various kinds of works. Then the decision about ownership can be made at an appropriately granular level, and the use rights of those with recognized interests in each category can also be assured.

Copyright ownership policies are important, and becoming more so everyday. Campuses that do not have such policies need to remedy that situation sooner rather than later, and before conflicts develop that will leave the decision to courts applying the default rules of the copyright law. The policy proposed by the University of Louisiana System is a poor model and an apparently ill-considered stab at such a policy. But if the controversy it has generated causes faculty in Louisiana and elsewhere to think hard about these issues, perhaps some good will result.

# Debating derivatives

*Mon, 27 Feb 2012 08:57:39, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: scholarly-publishing, category: technologies]*

During a recent visit to another university, I got into an interesting discussion with students about the difference, if there is one, between derivative works, the exclusive rights in which are reserved to copyright holders, and transformative fair uses. The latter, of course, are considered “not infringement.” The class of graphic arts students that attended my presentation was quite naturally confused about where the line between these two very different adaptations of an original work is. I really couldn’t help them very much, but more about that in a minute.

When I got back to my office, one of my first tasks was to read the [complaint in the lawsuit filed by the e-text platform company Kno against textbook publisher Cengage](#), alleging breach of contract. The [allegation is that Cengage has breached its contract](#) to allow publication of content that it owns on the Kno platform, allegedly because certain features of the platform infringe Cengage’s copyrights.

Two qualifications are necessary. First, a complaint is only one side of the story, so conclusions cannot be drawn from it. Second, this may just be a contract dispute in which the two parties are bargaining for the best terms they can get, and litigation is simply a strategy in the negotiation. That would be an unfortunate use of judicial resources, but it does happen. Nevertheless, it is worth looking at the copyright issues that are raised, even if they never reach the stage of a decision on their merits.

According to Kno’s complaint, Cengage alleges that several features of the Kno platform create impermissible derivative works. Specifically, Cengage allegedly objects to a “smart links” feature that inserts links to external educational resources into the text, to a “quiz me” feature that can create review quizzes from certain diagrams, and a “journal” feature that allows studies to record their own notes and pulls out from the text the excerpt to which the relevant notes refer. The pedagogical value of each of these features is obvious, I think, but it is interesting to ask if they really do create derivative works.

Traditionally, derivative works are those that adapt the actual expression that is protected in a work, and usually they adapt the entire body of that expression. Thus, a translation or an adaptation (novel to play, play to movie, etc.) are the paradigmatic examples. Based on these criteria, it does not seem like inserting “smart links” into a text creates a derivative work, just a more useful one. On the other hand, the “Quiz Me” feature does adapt some of the original expression in the text, but it adapts only a small portion. Here, I think Kno could argue that this is a transformative fair use rather than a derivative work (they do raise fair use as one potential response to Cengage’s objections).

It is the “Journal” feature that seems to be most in dispute, based on how much the complaint has to say about it. Students repeatedly tell us, of course, that one prerequisite to adopting e-texts is the ability to annotate the works, so this seems like a necessary part of any e-text platform. It also seems like a classic fair use of the excerpts. Insofar as the journal is just a layer over the top of the text, it hardly seems to implicate copyright at all. And where excerpts are pulled out for the student to comment upon, that is exactly what fair use permits. It is hardly different than if the student kept a separate notebook and copied out key phrases and passages, as I did throughout law school. If that is fair use, and no one really disputes that it is, so, it seems to me, is the journal feature of the Kno platform (as described in the complaint).

My biggest concern about the dispute described in this complaint is the possibility that it shows us another publisher trying to disable the very possibilities that make e-books attractive to consumers because they do not understand how those features work and feel threatened by them. E-texts specifically offer tremendous new potential for innovative learning, and ways to study a subject that work for a variety of different learning styles. But these are possibilities only if the publishers get over their intense fear of the digital environment and their express desire to [introduce “inconveniences”](#) so that their digital products mirror the limitations of the print world.

After all this, let’s go back to the debate about derivatives versus transformative fair use. My proposed criteria for what makes a derivative do not entirely solve the question. Both derivatives and transformative fair uses adapt the original expression of the work in question. In two examples above I suggest that the amount of the original work that is used may make a difference (it is, after all, one of the fair use factors). This is helpful, I think, but probably not sufficient. Perhaps the determinative question will be if there is market harm; courts that find transformative fair use usually remark that there is no direct market competition, and no “customary” licensing market, for the new, transformative use. These reflections suggest, I think, a broad outline of how to make this slippery distinction, but they do not make it easy. And they suggest that the dispute between Kno and Cengage really will turn on the terms of the license that is at the heart of the issue.

# An extraordinary week

*Wed, 29 Feb 2012 07:40:59, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

It has been an extraordinary week for open access advocates, and it is only Wednesday! For those keeping score, here is a recap of events, along with some commentary.

On Monday, Elsevier issued a press release [withdrawing its support for the Research Works Act](#). The RWA, of course, was a bill proposed in the US Congress that would have rolled back the National Institutes of Health public access mandate and forbidden any other research funding agencies from adopting similar policies that would give taxpayers unfettered access to the research for which they have paid.

Within hours of Elsevier's press release, the sponsors of the RWA in the House of Representatives [announced that they would not pursue passage of the bill](#). It seems it was Elsevier's legislation from the start, so the publishing giant got to call the shots for Congress. The announcement from Representatives Issa and Maloney contained the first extraordinary statement of the day, when they said that "The American people deserve to have access to the research for which they have paid." This, of course, is what they had tried to prevent, and we must read the statement with a suspicious eye. But on its face, it seems to acknowledge the fundamental justice behind public access policies. When the sponsors of the RWA folded their tents so promptly, I think we were left wondering if its introduction was simply a strategic move to stake out legislative ground, or a trial balloon by Elsevier to gauge support for open access. If strategy it was, it seems to have failed spectacularly.

Elsevier followed up its withdrawal of support for the RWA with an [open letter to the mathematics community](#). These scholars, remember, are at the core of the [boycott directed at Elsevier](#) that has been gaining momentum for over a month and is still growing. That letter also contained some extraordinary statements; in it the publisher seems to promise to lower some of its prices (although they base this promise on an arbitrary pricing standard that they have created) and to acknowledge that the bundling of journals into high-priced and inflexible packages (which they call "large discounted agreements") is a problem. I wonder if they mean this, or if it is simply more strategy?

The letter to the mathematicians contains an appeal for collaboration between Elsevier and the scholarly community. In that vein, I respectfully offer three paths that mathematicians might pursue regarding Elsevier in the coming months:

1. Talk with them, by all means, but don't believe everything you hear. Two principles are important to keep in mind. First, their primary value is returning a profit to their shareholders, not the progress of your work or your discipline. Second, they have no product to sell if you do not give them your intellectual property for free, so you have a lot of power here. In a [New York Times article published yesterday about the open access debate](#), scholars who support open access are called dishonest for continuing to submit their works to traditional journals; the boycott you have started reverses that alleged dishonesty and gives you considerable influence. Don't waste it.
2. Keep exploring alternative publication models. Even if Elsevier lowers its prices and introduces more flexibility into their bundling, it is hard to see the toll-access model as the path to the future. For mathematics, where grants are smaller and many scholarly societies depend on

subscription revenues, a “flipped” pricing model such as is being explored in physics with the [SCOAP3](#) experiment, might make the most sense. But in any case, it is important to keep experimenting with new ways to disseminate scholarship, especially more openly.

3. Whenever you or a colleague/student does publish with Elsevier, look carefully at the publication agreement that is offered and cross out any language that ties your right to self-archive your work to the non-existence of an open access mandate from your institution or funder (you can find a sample agreement with this language [here](#)). This is an outrageous interference with academic freedom, and authors should not tolerate it. Simply pick up your pen and cross out any language that says you may only post a final manuscript of your work if you and your colleagues have not adopted a policy saying that you must do so. In this regard, it is worth noting [this article by Kristine Fowler](#) from the AMS website analyzing the relative success that mathematicians have had negotiating the terms of their publication agreements with the largest publishers in their discipline.

Meanwhile, all of us — mathematicians, linguists, librarians, anthropologists or whatever — should transfer the energy we put into opposing the Research Works Act toward support for the Federal Research Public Access Act, which was introduced in both House of Congress a couple of weeks ago. The case for FRPAA is made far better than I could put it in this [essay on “Values and Scholarship”](#) that was published by all 11 provosts of the universities that make up the CIC (Committee on Institutional Cooperation) in last Thursday’s edition of Inside Higher Education. Their extraordinary, unified vision for scholarship in the digital age should provide the touchstone by which this discussion moves forward.

# A masterpiece of misdirection

*Mon, 05 Mar 2012 13:34:48, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

On February 28, the Authors Guild filed a [memorandum in support](#) of its “motion for partial judgment on the pleadings” in its lawsuit against the Hathi Trust and five of its partner libraries, asking the judge to rule that the activities the AG has complained about — the mass digitization of books and the proposed orphan works project — are not protected by the specific library exceptions found in section 108 of the copyright law and that Hathi Trust cannot even assert, much less successfully rely upon, fair use, which is section 107 of that law. There is a [news report on the motion from Publishers Weekly here](#).

The memorandum strikes me as a masterpiece of misdirection, trying to make plausible arguments that do not quite fit the actual case in front of the judge. The problem is that if the judge accepts these arguments, it could be devastating for libraries. At its heart, the motion argues that libraries do not have any fair use rights, since their entire set of privileges under the copyright act are encompassed by section 108. I think there are lots of reasons to reject this logic, which runs counter to the express language that Congress used in section 108 itself, which says (in subsection (f)(4)) that “Nothing in this section... in any way affects the right of fair use.

One way to see the flaw in the AG’s argument is to look at the odd results that arise if it is accepted. For one thing, libraries would thereby become disadvantaged actors under the copyright act. Other institutions and persons would still have the broad and flexible opportunities under fair use, but libraries would not. Indeed, in the other lawsuit about mass digitization in which the Authors Guild is a plaintiff, against Google itself, Google will be able to argue fair use to justify its mass digitization, if the case gets that far. But the plaintiffs argue that libraries cannot assert the same defense in regard to the same activity, simply because they are libraries, and thus disadvantaged by the existence of an exception that was supposed to benefit them.

By the way, this logic runs counter to the legislative history of the codification of fair use. Congress explicitly stated that it did not intend to change or harden the judicial application of fair use; they wanted judges to continue to be free to apply the factors to specific circumstances to make equitable decisions. But if placing section 107 in the same law as all the specific exceptions limits its application to situations not covered by those exceptions, that judicial freedom is undermined and the clear intent of Congress frustrated.

There are many other specific exceptions in the copyright law, and viewing them as limits on fair use again shows the absurdity of the argument. There is an exception that allows photographers to take pictures of publicly visible architectural works, even when those works are protected by copyright. If that exception is taken as the entire expression of the rights of photographers, then they could not argue fair use when taking photographs of other publicly visible copyrighted works, like a piece of public sculpture. That result is absurd, of course, and was implicitly rejected by cases allowing such photography. There is also an exception that allows public performance of music in the context of religious worship, but its existence does not mean that someone who sings a song in public outside of a worship service would not be able to argue fair use.

It is interesting to note that a consultation on copyright in Ireland, which issued [this consultation paper](#) earlier in the year, suggests the value of a fair use provision for the Irish copyright law and makes the

point that each of the specific exceptions can actually be seen as examples of fair use (see page 120). If each specific exception is read as an instantiation of the fair use analysis for a particular situation, the logic of ensuring that fair use always remains an option (as 108(f)(4) tries to do) is particularly clear. (Hat tip to David Hansen for bringing this paper to my attention)

One more potential absurdity — If libraries have no fair use rights, would it automatically be infringement for a library to capture and print a single still image from a film for a student to include in a paper? Section 108 excludes film from all but its preservation sections, so making a copy for a patron from a film would not be permitted under the 108 subsections on copying for users. Yet this activity would seem like an obvious fair use if anyone else did it. Why, we should ask, would libraries (and their users) be penalized simply for being libraries?

One of the difficulties here is that fair use is sometimes equated to “fair dealing” or “fair practice” in international copyright law. Those terms tend to be blanket concepts that incorporate but do not expand upon the specific exceptions within each national law. Fair use is different. It is a separate and free standing exception within the US scheme. We need to remember that the US law was not written within the context of international copyright harmonization and does not conform, in any number of ways, to the usual pattern of copyright in other countries. That fair use is a separate exception and not simply a blanket term or gap filler is proved, I think, by the specific reference inside section 108 to fair use as an alternative option for libraries. It is also a fact recognized and pointed out by the Irish paper on copyright linked above, which suggests that fair use can be seen as “a doctrine that defines the ambit of copyrightability and thus not an infringement at all.” As a boundary definition on the exclusive rights and the basic analysis underlying all of the specific copyright exceptions, fair use would, again, always be an appropriate defense that courts should never rule out as a potential argument.

The most creative part of the memorandum supporting the plaintiff’s motion is its attempt to convince the judge to ignore section 108(f)(4), the fair use “savings clause” quoted above. That language seems pretty categorical, and the phrase “right of fair use” certainly suggests that fair use is a positive right that does not simply fall away when more specific exceptions to copyright are enumerated. The plaintiffs ask the judge to ignore this phrase with two arguments.

First, they refer to the general principle that “the specific governs the general.” Because fair use is, allegedly, general, and section 108 is specific, it is asserted that 108 preempts the application of fair use in libraries. But as we have just seen, fair use is a positive right that Congress acknowledged by inserting section 107 into the law but did not intend to limit. So it is a different sort of thing; it is not merely a general principle that can be set aside by specific rules, but a distinct exception — or even a boundary definition — intended to do its own work within the framework of the law.

Second, the plaintiffs rely on a different case, *Corley v. Universal Studios*, in which a judge dismissed a similar fair use “savings clause” in the Digital Millennium Copyright Act. The problem is that that dismissal, which has not been followed by other courts even when interpreting the DMCA, is based on an entirely different reason than the one being asserted by the Authors Guild. The judge in *Corley* held that the activity in question, circumventing technological measures intended to prevent copying, was simply not the sort of thing that fair use was intended to apply to. He did not reject the “savings clause,” he merely found that the activity before him was outside its scope. In the *Hathi* case, of course, the activities in question are directly within the ambit of fair use, and the judge should respect the clear intention that Congress expressed as powerfully as it could in 108(f)(4). Whatever the ultimate decision about fair use may be, the defendants must be allowed to argue it if the structure of US copyright law is not to be grossly undermined.



# Momentum

*Sat, 10 Mar 2012 07:51:45, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories]*

I am leaving later today to fly to Bahrain, where I will be part of an international panel discussing open access at the [annual meeting of the Special Libraries Association, Arab Gulf Chapter](#). Libraries in the region, as I understand it, have not yet taken significant steps toward open access to scholarship, but they are anxious to learn. I think the spread of interest in the whys and hows of open access all over the world indicates how great the momentum behind this movement is. Even Elsevier called open access the wave of the future recently, even as they continue to try to stem that tide.

Public access, of course, is a subset of open access, referring specifically to access provided for the public to the results of research that is supported by significant government investments. The arguments for public access are so obvious that it may be the easiest form of open access to defend and to spread. Taxpayers deserve access to the research products they have paid for; even the sponsors of the ill-fated Research Works Act acknowledged this as they stepped away from the foolish proposal. And public access increases the accountability of governments for how they spend the money that is loaned to them by their citizens. Many other countries are way ahead of the US in providing this accountability.

All of this makes the [recent statement by the Association of American Publishers opposing](#) open access mandates from government funders seem all the more ill-advised. In some ways the language of the statement seems more carefully crafted and restrained, but close examination still proves that the arguments put forward are fundamentally misleading.

My favorite howler is this: “FRPAA [the [current legislation that would expand public access mandates in the US](#)] is little more than an attempt at intellectual eminent domain, but without fair compensation to authors and publishers,” said Tom Allen, President and CEO, AAP.” Really? It is hard to believe that the CEO said this, since it seems like a statement calculated to show how weak the publishers’ position really is.

FRPAA, of course, is nothing like eminent domain, for the simple reason that the government has invested in the creation of the intellectual property at issue in the first place. Indeed, what the publishers want is a continuation of the “land grab” from which they have long benefited; they want property that is really a public good — created with public funds on many levels — turned over to them and reserved for private gain. And do they really want to raise the issue of fair compensation for authors? Scholarly authors are often paid with public funds and have their research supported with public funds. Yet publishers take that work without any compensation to the authors. Only when they pay for the products they subsequently sell can publishers ask about fairness.

Later in the statement, the AAP provides a list of the ways in which they invest in the products of scholarship — “validation, digital enhancement, production, interoperability and distribution.” It is true that this is a list of services that publishers provide, more or less well. Interoperability, for example, is better served by open access than traditional publication. But let’s admit that these are services that publishers provide. None of them however, create a proprietary interest in the works in question, and they are all services that authors should be free to evaluate. If authors (who are the sole owners of copyright until they decide otherwise) believe that these services are not worth the cost of surrendering their rights, or that they can obtain them better through other forms of publishing, they should be free

to do so. The overwhelming support for public access by the research community suggests that they do believe that.

Finally, the AAP statement complains about the six month embargo that would be the maximum allowed under FRPAA. I have heard several versions of this complaint, and suggestions that for some disciplines the embargo window should be much longer, even as much as five years. To those concerns, I would respond that it is important not to confuse the period of time during which a work is useful in a particular discipline with the period of time during which it is profitable. In biomedical sciences, research dates quickly. But in other fields, and especially in the humanities, the usefulness of an article can be quite long-lived. But these embargo windows are not intended to define the term of usability; they are merely there to protect publishers' ability to profit from the article. And the window of profitability is certainly much shorter in these fields than the window of usability; subscription sales are exhausted within a very short time after publication, even if scholars continue to consult a particular articles for many years.

I am reasonably certain that the six month embargo included in FRPAA as introduced will be vigorously negotiated, and perhaps variable windows will be introduced. That's fine, but I hope the negotiations will be based on real data and not unfounded and incredible assertions. Publishers need to show us the curve that illustrates their profits. Do they really continue to make significant revenue after six months? After one year? Everything I have seen suggests that six months is very reasonable, when viewed as a window for profitability. If I am wrong, publishers need to show me that data. Since I and my colleagues are the ones who create their products, they owe us that much, at least.

# Dueling metrics?

*Sun, 01 Apr 2012 19:13:00, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

One of the interesting consequences of the rapid growth of open access to scholarship — a consequence that I, at least, did not see coming — has been some degree of competition, from the perspective of authors, between open access platforms. In this short article from AALL Spectrum, James Donovan and Carol Watson address a question they have encountered, “[Will an institutional repository hurt my SSRN ranking?](#)” At Duke we have been asked a similar question in regard to RePec, the repository for economics. Considering these questions gives us interesting insight into the maturing movement toward open access scholarship.

One way to deal with this concern, which we have undertaken in regard to RePec, is to work with the disciplinary repository to feed article statistics from the institutional repository into the rankings produced by the disciplinary one. That method provides a more comprehensive and accurate ranking of the articles. And such rankings are, of course, a more useful measure of impact than impact factors, which apply to journals but not to individual articles, can ever be.

I do not know if it is possible to connect institutional statistics to SSRN or not, but Donovan and Watson describe a different approach to addressing this question. They begin by pointing out an assumption behind the question, that article readership is a zero-sum proposition, that there is a defined number of readers for any given scholarly article, so that new means of access will simply divide up that readership, not generate new “eyeballs on the article.” This is the same assumption made by publishers who insist that self-archiving, or even national funder policies, imperil their revenue, and by those who argue that libraries will never spend subscription dollars on works that will be made available freely. Donovan and Watson begin the process of showing that this assumption is false.

In their article the authors report two different research methods they employed to study the question of whether one repository siphons readers away from another repository, or whether, instead, readership grows overall when an article is available from multiple OA sources. Both methods lead them to the same conclusion: multiple outlets produce additional readers, so the sensible course for an author who wants her work to have maximum impact is, as they say, to “use both!” Far from harming the ranking in one database, availability of an article in a second repository appears to increase substantially the overall number of downloads.

I like this article for two particular reasons. The first is that it attempts to find solid data on which to base the discussion. Instead of mere assertions of “obvious” truths in the open access debate, many of which are based on that zero-sum assumption, Donovan and Watson attempt to move the discussion to real evidence that actually places that assumption in some doubt. As we continue to explore business models and look for dissemination options that more fully serve the needs of scholarly authors, basing our discussions on real data would be a refreshing trend.

The second reason I like this article is that it appears to offer empirical evidence, beyond the [many anecdotes that we have collected over the years](#), of the role of “unexpected readers” in increasing the reach of scholarly research. The zero-sum assumption gives rise to the presumption that the current system works in an acceptable way merely because the people I expect to see my work can see it. But open access offers the possibility of discovering a myriad of readers who are not expected, either by publisher or author. If we take seriously the idea that academic research is undertaken, in the end, for

the good of society, these are precisely the readers we would want to see find our scholarship. And to rule them out on the basis of an unproven assumption would be to sell ourselves short as scholars.

# Seeking a boundary

*Tue, 10 Apr 2012 19:49:06, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: scholarly-publishing]*

Is it just me, or do there seem to be a lot of lawsuits filed by publishers in the higher education space recently? It is increasingly obvious that the disruption caused by the digital environment has led publishers to embrace litigation as a strategy for protecting their business models, and that that strategy cannot be good for the overall well-being of higher ed.

The [latest such lawsuit](#), filed on March 16 in the Southern District of New York, comes from three major textbook publishers — Pearson Education, Cengage Learning, and MacMillan Higher Education — and targets a new Internet-based business called Boundless Learning that purports, according to the complaint, to create textbooks, using open educational resources, that parallel and can replace the high-priced textbooks that each of these publishers offer. The sum of the complaint is that Boundless copies the selection, arrangement and organization of their textbooks much too closely and so constitutes copyright infringement.

One should never form conclusions about a lawsuit based only on the complaint, which is inevitably just one side of the story and is always pitched to make the defendant's behavior look as dastardly as possible. Nevertheless, it seems safe to conclude that this lawsuit is not as farfetched as some of the ones we have seen recently. The plaintiffs are really just asking the court to help draw a line that has never been very clear in copyright jurisprudence, the line between idea and expression. Their description of the situation makes it sound like the placement of that line is obvious, but it probably is not. What it certainly is, however, is a vital line for higher education to examine and understand.

I occasionally run across an interesting assumption about copyright, which I think is common both in academia and in the wider world. It is the belief that if you want to reuse an image or a figure without permission, you can simply redraw it and avoid all copyright entanglements. Like all simple rules in copyright, this one is not true; the standard for infringement is "substantial similarity," and a redrawn figure or image that is substantially similar to the original could still be found to be infringing. Far better, I tell those who raise this possibility with me, to use the original figure or picture in a way that supports the assertion of fair use, or to get permission.

From the complaint, it sounds like Boundless Learning is doing something similar to this "redrawing" in hopes of avoiding copyright problems. The plaintiffs assert that Boundless creates "shadow versions" of their copyrighted textbooks, imitating the arrangement of topics and sub-topics, the depth of coverage for each area, and even the choice of illustrative examples. I fail to see how a running and a fishing bear illustrate the First and Second Laws of Thermodynamics, but the complaint claims that the Boundless biology text imitates Pearson's standard text on the subject down to such similar, but not identical, pictures.

So the question is directly posed about where the line between idea and expression is to be fixed. Is the example of a bear merely an idea, which cannot be protected by copyright, or does it represent a creative and expressive decision by the Pearson authors which is infringed even by a different picture? To put it another way, how much actual expression must be copied, if any, to infringe on another's protected expression? We have seen the "derivative works" right expand a great deal over the years, so that today even characters in a work of fiction are often protected even when the alleged infringing

character copies no actual expression from the original (as in the [recent Catcher in the Rye sequel case](#)). Is there a boundary on that right?

Since scholarship is an inevitably cumulative process, in which each new work builds, more or less explicitly, on what has been done before, the boundaries of the derivative works right and the line between protected expression and public domain ideas are very important to understand. If this case brings us a little more clarity, that would be good. But the judge will need to be very careful not to develop rules that would inhibit the basic processes of teaching and research.

Finally, I want to point out an oddity I noticed in the complaint that was filed to initiate this case and which will bear watching (no pun intended). In addition to naming Boundless as a defendant, the complaint lists 10 “Doe” defendants; people who are alleged to be complicit in the claimed infringement but whose names are not known and can only be discovered through court orders. Naming such John and Jane Does is a common technique in file sharing lawsuits and in some of the more notorious copyright “trolling” cases. But in this complaint it is quite odd, because we have no real clue what role these people are alleged to have played or why they are being sued. Are they students who have ordered “shadow” textbooks from Boundless, employees of Boundless, or faculty members who have recommended Boundless to impoverished students? As the case goes forward, we may learn something about how to draw the line between idea and expression, and we may also discover just who the publishers are willing to target in their campaigns to use litigation to protect their markets, if and when the identities of these Doe defendants are revealed.

# First sale goes to the Supreme Court, again

Mon, 16 Apr 2012 15:16:01, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: libraries]

With the Orphan Works conference taking place last week, there is an awful lot to blog about. I will address the conference in the next couple of postings (unless there is a GSU decision), but for now I want to look at [another round](#) in the *John Wiley v. Kirtsaeng* case.

Lest we have forgotten, *Kirtsaeng* was the latest in a series of cases asking to what degree the doctrine of first sale, which says that the purchaser of a lawful copy of a work may further distribute that copy as she pleases, applies to copies of works that were manufactured and sold abroad. In 2010 the Supreme Court looked at this issue in *Costco V. Omega*. In that case, Justice Kagan recused herself because she had worked on the case as Solicitor General for the Obama administration, urging a ruling in support of Omega watches over Costco, which was importing watches purchased cheaply overseas and underselling the MSRP in the US. The Ninth Circuit agreed with SG Kagan and ruled against Costco, holding that the US doctrine of first sale did not apply when an item was made and purchased overseas. The Supreme Court, without now-Justice Kagan, split 4-4, a vote which left the Ninth Circuit's ruling in place but did not make it binding precedent for the rest of the country.

Then, in 2011, the Second Circuit upheld a lower court in ruling that Mr. Kirtsaeng was an infringer for reselling copyrighted textbooks that his family members bought in Thailand and sent to him in the US, where he could get a higher price for them than had been paid. The Second Circuit handed down [a sweeping ruling](#), which [I criticized here](#), in which the two-judge majority went further than *Costco* and maintained that first sale would not apply even if the work that had been manufactured abroad was sold in the US with the authorization of the rights holder. As I said in my earlier post, this created a situation where the copyright holder could knowingly and deliberately take advantage of all the protections of US law without being subject to one of its most important limitations.

Now the Supreme Court has agreed to review the case, and many people hope that they will correct the overly broad ruling made in the Second Circuit.

One of the things that often leads the Supreme Court to agree to hear a case is a split amongst the Circuit Courts of Appeal on a particular point of law. Here such a split is very clear. The Second Circuit holds that a foreign-made work can never be resold in the US by *any* purchaser without the consent of the rights holder. The Ninth Circuit, in the *Costco* case, says that such a work may be resold in the US, but only *after* an authorized "first sale" *in the US*. And the Third Circuit believes that a US resale is alright anytime the original sale was authorized by the rights holder, even if that sale occurred outside the US (so that both the resales in *Costco* and *Kirtsaeng* would be legit). Given Justice Kagan's position in the *Costco* case, I would guess, if I had to guess, that the Court would opt for the Ninth Circuit rule, which mitigates the absurd results from *Kirtsaeng* but still narrows first sale considerably over what the Third Circuit would allow.

I hope that as the Justices consider this case they will recall that, by adhering to the Berne Convention and the WTO's TRIPS agreement, nearly all countries now extend "national treatment" to the citizens of every other signatory nation. This means, I believe, that we should read the requirement of "lawfully made" quite broadly. As long as a work is not pirated — that is, it is made and/or initially sold with authorization of the rights holder — we should recognize that it is entitled to full protection under US law and therefore ought to be subject to all of the limitations of that law. If rights holders want to

practice price discrimination in different countries, they should rely on the cost of exporting to enforce those differentials and accept a certain percentage of “gray market” goods. But that is not what I expect to happen.

If my expectations rather than my hopes are fulfilled, it will be difficult for libraries to be secure in lending any of the works they purchase abroad, especially film. And vendors who sell to libraries might have to bear the extra expense of selling through a US outlet, if libraries become fearful of buying abroad. It is an issue that the library community, which depends for its most fundamental activities on first sale, needs to continue to watch closely.



# How to solve the Berne Problem, part 1

*Wed, 18 Apr 2012 15:05:47, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: orphan-works, category: public-domain]*

The conference on [Orphan Works & Mass Digitization](#), hosted by the Law School at the University of California, Berkeley last week, was exciting — at least to the 230 copyright geeks like me who attended — and filled with well-researched papers. The [three White Papers that were prepared](#) by the Samuelson Law, Technology & Public Policy Clinic (written by former Duke Scholarly Communications Intern David Hansen) are well worth reading. In this first post I want to look at a basic terminological issue and then focus on two general observations from the event. In a subsequent post I will describe three specific suggestions made by conference speakers for solving the orphan works problem.

It is the phrase “orphan works problem” itself that sparked terminological debate. Several speakers were uncomfortable with that expression, and an alternative — “hostage works” — seemed to gain some traction among participants. But the suggestion that really got to the root of the issue was that we should refer to the proliferation of works still in copyright protection but for which no rights holder can be located as the “Berne problem.” This is appropriate because the problem was so severely exacerbated by U.S. adherence to the Berne Convention in 1988 and the legislative changes that that decision required. Four steps contributed significantly to the problematic situation we are currently in:

1. The move to automatic protection, which often makes people into rights holders against their will and without their knowledge,
2. Copyright term extension, which inevitably makes heirs or successors-in-interest into rights holders, again often unawares,
3. The end of the renewal requirement, so that rights holders no longer have a chance to indicate their continued interest in a work; thus no “abandoned” works move any longer into the public domain,
4. The end of the registration requirement, which now makes locating rights holders so much more difficult.

The combined effect of these changes to U.S. copyright law, all accomplished between 1978 and 1989, has been to create a huge class of orphan works. So it is not surprising that many of the suggestions for how to deal with the problem pushed toward reversing or mitigating some of these changes. Registries, for example, were a common theme; under these various proposals to create registries to assist in finding copyright holders for different types of works, we would simply be recreating (hopefully more efficiently) the registration database of the Copyright Office, which once could claim mandated comprehensiveness but unfortunately can do so no longer.

The first observation from the conference is that nearly all of the speakers (except the industry representatives and Registrar of Copyright Maria Pallante) seemed to think that legislation to solve orphan works is probably impossible and likely a bad idea. The political climate in Washington makes attention to copyright issues unpalatable, and the proposal we saw several years ago was unattractive to many of the speakers. Instead of newly created legislative schemes, potentially with burdensome and impractical requirements, many of the speakers looked for small changes that could be accomplished either in common law — by action of the courts, that is — or by simple legislative

amendments to portion of the law as it currently stands. In our next post we will examine some of these more modest suggestions.

Closely related to this distrust of the legislative process as a path for solving orphan works was a clear distaste, again expressed by multiple speakers, for solutions that would create a regime of extended collective licensing (ECL). Such ECL programs would, of course, require a complex legislative enactment, and examples where such programs are in place were widely considered failures on a practical level; a professor from Canada, which has such a plan, was especially clear that this is not a workable option. On the level of policy, an ECL scheme, where potential users of orphan works apply to some government-authorized board for permission and pay a fee, was denounced as economically inefficient. The purpose of legislative licensing schemes is to facilitate the transactions so that users can find owners and owners benefit from the uses. With orphan works, of course, there is no owner to be found so no transaction like this is actually facilitated. Instead, the fee that would be paid to some collective organization would amount simply to a tax on use, with no economic benefit or incentive for creators at all. One speaker refer to this sort of approach as similar to the medieval practice of selling indulgences, based on a dogmatic conviction that all unauthorized uses are a form of “sin.” Any program based on such a foundation, rather than on solid economics, incentives for creation and cultural development, would be bad policy from the copyright point of view.

# Keeping it simple, or how to solve the Berne problem, part 2

*Fri, 20 Apr 2012 13:19:48, ksmithl2@duke.edu, [category: fair-use, category: orphan-works]*

My first post about the Berkeley orphan works conference focused on what we had done to create the massive orphan works problem we now face, and what mistakes we should avoid in the future as we try to solve it. Now I get to be a little more positive and discuss some of the suggestions I heard ([all of the PowerPoints are now available](#)) for solving the problem that seem quite workable. The overarching theme, I think, is keep it simple; rely on small legislative changes or solutions that can be implemented at the trial court level, rather than on big ideas.

Perhaps the foundational presentation focusing on a simple approach was from Jennifer Urban, one of the Directors of the Samuelson Law, Technology and Policy Clinic, who simply laid out the argument that use of orphan works most often will be fair use. Her principal innovation in the fair use analysis was that it should begin, in this case at least, with looking at the second fair use factor, the nature of the original work being used. The second fair use factor is not often asked to do much work, in my opinion, and attentive readers of this blog will know that I have suggested before that more emphasis be put there in regard to academic works. Professor Urban's argument about orphan works focused on the second factor for a similar reason — by starting there we could more clearly focus on the incentives for creation of a particular type of work and understand that there is no incentive to be gained for the creator or publisher of a true orphan work by charging a toll for use. Indeed, Urban moved from the second to the fourth factor, an easy transition in this argument, and pointed out that an orphan work represents a complete “market failure” in which the economic impact factor clearly favors fair use. So the simplest solution to the orphan works (or Berne) problem is just to recognize that the tools to facilitate beneficial uses of orphans already exist in U.S. law.

A proposal that meshed nicely with this approach was made by [Professor Ariel Katz](#), from the University of Toronto, who suggested that courts could merely “tweak” the remedies for infringement to support uses of orphan works by taking into account, at the remedy stage, whether or not a reasonable search for a rights holder was done by the user prior to use. If a court found that such a search was done, and no rights holder found, then damages could be waived or reduced to a reasonable fee for the use. This suggestion can be seen as complementary to Professor Urban's, since a fair use argument, if successful, could avoid a finding of infringement and, even if the judge did not accept fair use, a second step, adjusting the remedies, could still avoid the inefficiency of penalizing a beneficial use of an orphan work. It would also provide an incentive for rights holders to take steps to be findable, which would protect their potential remedies and increase the likelihood of an efficient transaction over the proposed use. Taken together, these two proposals require no legislation at all and could significantly improve the efficiency of the system by which culture replicates itself and develops.

Perhaps the most enlightening part of Professor Katz's talk, however, was his analysis of the thinking that stands in the way of an elegant solution to the problem of orphan works. He spoke about how the “permission first” mentality has become a kind of “dogma” which blinds many to the possibility of simple and sensible solutions. By focusing on the idea that all uses must be permissive, even if that permission comes from a licensing organization and does not benefit the work's creator, we treat reuse of culture as a kind of “sin” and set up a licensing model that parallels the medieval system of indulgences. “The coin in the coffer rings and an orphan work from idle purgatory springs!” This

approach is inappropriate and deeply inefficient when we speak of cultural creativity, which is inevitably cumulative and can be seriously undermined by a “permission first” attitude.

A different analogy was drawn by Professor Lydia Loren of Lewis & Clark School of Law, who preferred the term “hostage work” to the language of orphans. She focused on the parallel with real property law and the doctrines on abandonment and waste. As she said, there is a public interest that the law has long recognized in preventing what is called “permissive waste,” whereby a property owner allows the property to fall into disuse and become unproductive. Such property, whether real or intellectual, is then held hostage to an exclusive right of ownership that is not being responsibly exercised. In real property, we have doctrines like adverse possession and abandonment that will simply take that ownership right away when the waste is harmful to society.

Regarding “hostage” works of intellectual property, Professor Loren suggested that the incentive for creation had clearly already worked, since the work had come into being, but that the incentive to disseminate that work — to share it for the cultural benefit of all — had failed. In light of that failure, “waste” should be prevented in a way that benefits the public. Her fascinating suggestion was that the user of such a work should be protected from liability for infringement (if a rights holder arises), but only if the user has made a copy of the work available in openly accessible form. Thus the public interest is served, by the accessible copy, yet the user can still make whatever use she wants, even a commercial one. A rights holder that arises later might be able to stop that use, but the public has still benefited and the waste caused by a period of abandonment has been prevented.

These proposals gave me some reason to believe that we could make progress on the orphan works problem without needing large legislative changes, which almost never make copyright law better, and without actually shirking our commitments under the Berne Convention and TRIPS Agreement. However unfortunate some of the effects of implementing those treaties in the U.S. has been, solutions to the worst damage done are still at hand.

# A safe harbor, not an anchor

*Mon, 30 Apr 2012 14:16:48, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

Whenever [Jonathan Band](#) writes a “Friend of the Court” brief on behalf of the Library Copyright Alliance, it is sure to be worth careful reading. One not only learns a lot about the particular case from Jonathan’s filings, but also a good deal about the legal and social place of libraries the U.S.

Jonathan’s [most recent brief amici curia](#) was filed ten days ago in the case brought by the Authors Guild against the [Hathi Trust](#) and five of its university partners. In some ways it is an unlikely case in which to seek any enlightenment, since the posture and the legal theories advanced by the plaintiffs are odd, to say the least. While it is hard to see this complaint going very far, the consequences if it did, and especially if the recent motion for partial summary judgment filed by the Authors Guild garnered any credence from a court, would be catastrophic for libraries. Fortunately, Jonathan’s brief in response to that motion is smart and, I think, devastating. And, as usual, it tells libraries some important things about themselves.

The motion, which I [discussed here](#) several weeks ago, argues that the only exception that libraries can rely on in the Copyright Act is section 108, the specific exception that authorizes some preservation and interlibrary loan activities. It explicitly claims that fair use is unavailable to libraries, whose rights, it asserts, are entirely circumscribed by section 108.

In short, the AG would transform a safe harbor included in the copyright law promote certain library services into an anchor that would restrain libraries from performing many of their day-to-day activities. Or, as Jonathan puts it, “They [the Authors Guild] seek to transform an exception intended to benefit libraries into a regulation that restricts libraries.”

Jon goes on to list many of the library activities that the public depends upon that would be of doubtful legality if the Authors Guild’s argument was taken seriously, ranging from ordinary, daily lending of materials to digital exhibits. One of his most effective arguments is based on the many portions of the Library of Congress’ American Memory project that explicitly rely on fair use. As the brief says, under the plaintiffs’ theory, the Library of Congress, in which the Copyright Office itself resides, would be “a serial copyright infringer.”

The absurd results of this radical and insupportable theory advanced by the Authors Guild are balanced by arguments both that the plain language of the law (and its legislative history) support the obvious proposition that fair use is available for libraries, and that, in fact, section 108 would permit the orphan works project that Hathi proposed and the Authors Guild seeks to prevent.

So the brief effectively counters the bizarre theory advanced by the AG. But it also implicitly tells us two things about where libraries stand today that are worth noting.

First, it reminds us that libraries are always adapting to the changing needs of their patrons, many of which today are driven by rapid advancements in technology. The ways people encounter culture shift with alarming regularity and libraries must stay abreast of these shifts. Fair use, which has existed in U.S. law for over 170 years, has always been a key part of libraries’ ability to respond to patron needs, and Congress recognized the continuing need for libraries to be able to rely on fair use when it drafted the 1976 Copyright Act. Section 108 is important for libraries, and it still has a role to play in library

services. But fair use is, perhaps, more important in an era of rapid change. As Jon writes (quoting a 1990 case):

While the specific exceptions provide courts with no discretion, fair use is “‘an equitable rule of reason’ which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.”

The second, more troubling, reminder from this case and Jon’s filing is that the Authors Guild has shown itself willing to launch an extremely broad and devastating attack on libraries in order to protect some strange fantasy about how they can make more money. Libraries have always been, and should remain, the best ally of authors who seek to find readers. It is foolish and short-sighted of the Author’s Guild to turn on libraries, and to advance a theory that would cripple them, without apparently realizing how much harm those actions could do to authors.

In a previous debate about this case, a commentator wrote “I don’t care about readers, I want buyers.” It seems this attitude is assumed by the leaders of the Authors Guild, but it is disturbing for three reasons.

First, this attitude neglects the fact that library readers often become buyers. Marketing their books is something authors expect from publishers, but if libraries are taken out of that equation, it will grow more difficult. Especially in the world of online purchasing, the ability to discover and browse a book at a library is one of the best routes to placing an order for that book.

Second, not all authors (or even most, I daresay) share this attitude. The majority of authors, including all scholarly authors, write, I hope, to be read. Many are simply not motivated by the lure of profit, since profit is unavailable. When profit is possible, it can be very important, but it does supplant, in most authors I believe, the fundamental desire to communicate, to be read.

Finally, when the desire to make a profit does overcome the desire to express oneself and to be read, the result is inevitable an uninteresting book. Those who do not think first about readers do not deserve any.

If the diverse members of the Authors Guild do not all share this assumption that readers and buyers are distinguishable, and only the latter are desirable, than they are seriously misrepresented by this filing, and should be grateful, along with the library community, to Jon Band for his work on behalf of readers everywhere.

# Of groundhogs and sequoias

*Fri, 11 May 2012 08:51:08, ksmithl2@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Lately my life has had a certain resemblance to that of Bill Murray in the movie “Groundhog Day.” Like Murray, I seem to be repeating the same pattern in my daily work life over and over.

The basic pattern is this. I am asked, often with a colleague or two, to meet with a faculty member or group of faculty members. Sometimes this is at my home institution, and sometimes it takes place on a campus I am visiting. Wherever they happen, the conversations follow predictable lines. Yes, we agree, the current system for publishing scholarly articles, dominated by a small handful of commercial giants, is inequitable for authors and does not serve the best interests of scholarship. Yes, open access offers many benefits for authors, institutions and society. From there we usually begin to detail the various ways that open access can be accomplished, including the challenges and advantages associated with each model. We always have the sustainability conversation, in which I try to convey the sense that we are involved in lots of experiments right now but the one thing that seems pretty clear is that the traditional model of scholarly publishing is itself not sustainable (which most folks realize).

Often the faculty authors and editors with whom we talk have specific horror stories to tell, specific ideas about how to get scholarly publishing on a better track, and specific worries about how the transition will be made.

In spite of the repetition, I enjoy these conversations. I learn a lot from hearing about the particular experiences of authors and editors, and about their notions of what a better system would look like.

There is another, more important reason that I do not resent having to have these discussions over and over again. I constantly remind myself that the ideas about publishing and open access are beginning to filter down into our faculties and they are beginning to turn their attention to how to change the system. This is a remarkable development, and it is a reminder that the 11,447 scholars who have signed the [Cost of Knowledge pledge](#) to boycott Elsevier (as of this writing) are really just the tip of an expanding iceberg. Many others have not signed that pledge, which is often mistakenly assumed to be just for mathematicians, but have become more aware of the problem and, more importantly, ready to seek alternatives, because of that public campaign.

I think we have reached a point where we are no longer having to sell the idea of open access. There is widespread acceptance that that is the way that all or most scholarship will be distributed in the near future. The discussions we are having now focus on specific advantages of OA, like [altmetrics](#), the mechanics of the transition, and the ways in which costs can be managed.

One specific question that arises in every conversation is how the promotion and tenure process will have to change as open access becomes the rule rather than an exception. Part of the answer is to point out that several forms of open access are entirely compatible with the traditional evaluation techniques in P&T processes. But as digital scholarship becomes the norm for many researchers, there is a growing awareness that P&T is going to have to change to take account new forms of scholarship. It is not open access *per se* that will drive this change in P&T, but rather these new approaches to scholarship for which openness is an added benefit.

In this context I was delighted to see the recently released “[Guidelines for Evaluating Work in the Digital Humanities and Digital Media](#)” from the Modern Language Association (there is a [story about the guidelines here](#)). To be perfectly honest, there is little in the Guidelines themselves that is groundbreaking; they are commonsense suggestions about how scholarship should be evaluated, with some really good, specific attention to uniquely online aspects.

What is important here is not so much what the Guidelines say as who is saying it. It is very important that the MLA, one of the oldest and largest scholarly societies in the U.S., is taking notice of the changes that are happening in scholarly communications. As with the faculty open access conversations, this is evidence that change is penetrating the academy broadly and deeply. The revolution in scholarly communications will not, in the end, be accomplished by librarians; it will be accomplished by scholars, authors and their scholarly societies. That those groups are beginning to notice the need for change and to engage in the debates about how to accomplish it is a significant step forward.

I say “revolution” with tongue in cheek here. Perhaps some of us once expected a rapid conversion, a flipped switch that would change the scholarly publishing world to open access, but that is not going to happen. Our world will be changed through many conversations, lots of experiments (some of which will not succeed), and the growing activities toward change of scholars, universities and societies. I recently talked with a colleague who expressed some doubt whether a career in academic librarianship really made a difference, and I assured her that, in my opinion, we need to see ourselves as sequoia farmers. We make small contributions and sometimes see very little growth. But over time (and, in this case, place) the progress is substantial and the results can be gigantic. And just occasionally — I think we are in one of those moments — we get to witness a growth spurt.



# Breaking news

*Fri, 11 May 2012 18:06:44, ksmithl2@duke.edu, [category: uncategorized]*

I have just learned that Judge Evans issued her ruling in the Georgia State case this afternoon. I have not seen it yet, but am told it is quite long and that only a handful of infringements were found among the 99 instances of copying that were challenged. I will post about the judge's analysis as soon as possible.

# The GSU decision — not an easy road for anyone

*Sat, 12 May 2012 05:03:04, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use]*

Overall there is good news for libraries in the decision issued late yesterday in the Georgia State University e-reserves copyright case. Most of the extreme positions advocated by the plaintiff publishers were rejected, and Judge Evans found copyright infringement in only five excerpts from among the 99 specific readings that had been challenged in the case.

That means she found fair use, or, occasionally, some other justification, in 94 instances, or 95% of the time.

But that does not make this an easy decision for libraries to deal with. Indeed, it poses a difficult challenge for everyone involved, it seems. For the Judge, it was a monumental labor that took almost a year to complete. She wrote 350 pages, working through a raft of legal arguments first and then painstakingly applying them to each of the challenged readings. And for me, with a week's vacation pending, I am trying to make sense of this tome before I leave, which is why I am writing this at four in the morning on a Saturday (please excuse typos!).

For the publishers who brought the suit — Oxford, Cambridge and Sage — there are some bitter disappointments. Judge Evans explicitly rejects the Guidelines for Classroom Copying as the standard to be applied. She also found the two major cases on which plaintiffs relied, *American Geophysical Union v. Texaco* and *Princeton University Press v. Michigan Document Services*, to be inappropriate analogies for the situation before her.

One holding that is certain to generate much discussion is Judge Evans' rejection of the so-called "subsequent semester" rule, which had evolved from the Classroom Copying guidelines and led many institutions to assert that a liberal interpretation of fair use was permissible once but that permission had to be sought for subsequent uses of the same text. Judge Evans found this restrictive approach to be "an impractical, unnecessary limitation" (p. 71).

Perhaps most distressing for publishers is the Judge's statement that permission fees are "not a significant percentage of Plaintiff's overall revenues" and that their loss through the assertion of fair use does not threaten the publishers' business. She calls this latter argument "glib" (p. 84).

In spite of all this, there are significant aspects of this ruling that will prove very difficult for libraries as well. Two aspects seem especially likely to stir up consternation.

First, the Judge applies a strict standard for the amount of a work that is permissible under fair use in this situation. The percentage she selects is 10%, or a single chapter. In putting this percentage into practice, she bases the calculation on the total page count of a book (this was an issue at trial, with publishers arguing that only the actual text of the work should be counted), and rejects any distinction for books that are edited, in which each chapter has a different author (p. 88). This is a less flexible standard than many libraries would like, I think, and it seems too rigid to be a good fit with the overall structure of fair use.

Second, the Judge bases many of her analyses of the fourth fair use factor on the percentage of the overall revenue that publishers realize for a particular title that comes from permission fees. She criticizes the GSU policy for not providing sufficient guidance for making a determination about this kind of market impact, but immediately acknowledges that the standard she is applying “would likely be futile for prospective determinations (in advance of litigation)” (p. 337). This is simply an unhelpful approach, since libraries and faculty members must make such prospective determinations without knowing all the information that publishers provided, under court order, to the judge. Recognizing this, Judge Evans says that “the only practical way to deal with factor four in advance likely is to assume that it strongly favors the plaintiff-publisher (if licensed digital excerpts are available)” (p. 338).

Hard as it may be to be told to make this assumption, even though the judge has found it not to be the case in most of the instances before her, we should pay attention to her qualification of it. The permissions we should look for are those available for digital excerpts. In another place she asserts that she will consider the permissions market in the fourth factor analysis only when a license is “readily available” at a “reasonable” price for a “convenient” format (p. 89). She explains that the license must, to qualify as convenient, allow digital excerpts. This standard is actually hard for some publishers to meet in their current licensing postures. No infringements of Cambridge works were found, for example, probably in part because Cambridge allows only very limited licensing through the CCC. If publishers do not license in a way that facilitates reasonable educational use in the digital environment, the fourth factor will, she seems to be saying, cease to favor them.

Two more quick points, and then I will try to summarize the fair use analysis the Judge is recommending.

First, it is very important that the Judge finds that GSU’s copyright policy was a good faith effort to comply with the copyright law by interpreting fair use (p. 338). She criticizes the policy on two points — its failure to define the strict percentage limit she says is necessary and for not providing guidance about market harm, which she admits would be impossible. But she does not believe the policy was a sham or merely “cover” for doing whatever the faculty wanted, as publishers asserted. This would be a significant finding if money damages were at issue, due to the waiver of statutory damages in the law for educational institutions that make good faith fair use decisions.

The second point I think is interesting is the fact that Judge Evan considered hit counts when making determinations about some of the disputed excerpts. In some cases she cuts short the fair use analysis because hit counts suggest that no students actually read the material. In those cases she calls the copying “de minimis” and ends her analysis (see p. 96, i.e.). This means that it will be hard to dispute about specific readings without knowing whether or not they were actually read (we know, sadly, that many such assignments are not). Putting infringing material in a system, apparently, is not enough to establish liability; plaintiffs will have to show it has been used.

So here is the bottom line on the fair use analysis Judge Evans has outlined (pp. 87 — 89 of the opinion). The first factor — purpose and character of the use — heavily favors fair use because it is for non-profit teaching and research. She mentions the section 107 reference to “multiple copies for classroom use” and she does not employ a “transformational” approach. She finds that the second factor also favors fair use, since all of the works at issue were non-fiction and educational in nature. The third factor can go either way, depending on whether or not the excerpt is less than 10% or a single chapter. The fourth factor is where the difficulty lies; Judge Evans finds that it “heavily favors” the plaintiffs IF a license for the appropriate format is readily available at a reasonable price. There is lots of room to debate this part of the analysis, and lots of uncertainty, I think, about how it can be applied.

The Judge has deferred any action on crafting a remedy for the few infringements that she found. She has asked the plaintiff to suggest an injunction, which will be difficult to craft to fit this ruling and will have to look very different from the one they suggested 18 months ago. GSU will have a chance to object to any draft injunction, so the remedies phase of the case will go on for a while.

In general I expect librarians to be happy about the outcome of this case. It suggests that suing libraries is an unprofitable adventure, when 95% of the challenged uses were upheld. But there will also be a good deal of hand-wringing about the uncertainties that the Judge has left us with, the places where we need information we cannot reasonably obtain, and the mechanical application of a strict percentage. We will spend considerable time, I think, debating whether and how to implement Judge Evans' rules into our own copyright policies. In the meanwhile, of course, the ruling is nearly certain to be appealed.

(Note that the opinion is not yet up on the free sites that I usually link to, but three different comments to my previous post have provided links to PDF copies)

# More on GSU and the publisher response

*Tue, 22 May 2012 06:57:27, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

Now that I am back from vacation and have read the GSU ruling and some of the commentary more thoroughly, I wanted to add a few additional comments. In many cases these may be repetitive of things others have already said; I have not read all the commentary, of course, and some of this writing is for my own sake as much as yours. If it is redundant, I apologize.

I do hope most folks either have read or will read Brandon Butler's ["Issue Brief" for the Association of Research Libraries](#), which does a great job of analyzing the ruling.

The main thing that struck me as I read the fair use discussions for the individual excerpts that were in question in the case is that Judge Evans really did understand that fair use is a balancing test. Although some parts of her reasoning are more mechanical than I would like, she does not take a bright-line view of any of the factors. It seems worth a look, to me, at the way she relates the four factors in her discussion.

First, she finds that the first two factors — the purpose and character of the use and the nature of the original — always favor fair use in regard to the specific use and the specific works before her. This is true even though she declines to hold that the provision of short course readings is transformative, which is the key determinant in most fair use rulings over the past few decades. Instead, she sees this activity as at the heart of what fair use is intended to be, according to its own express terms. On the nature of the original, she holds that the works in question were all published and factual in nature.

This point about the second factor is likely to be the focus of some disagreement from the publishers. They wanted the court to hold that factor two did not favor fair use, apparently because of the effort involved in writing and publishing academic works. No one is more respectful of the labor of scholarship than I am, but hard work by itself does not get one a copyright or insulate one's copyright from fair use. The Judge observed that educational works are exactly the works that fair use is focused on, with its favored purposes of research, scholarship and teaching. She also noted that permission fees make up no part of the incentive for academic authors to write their works (p. 81ff). This, to my mind, is the key reason for finding that factor two favors fair use in this case (although the Judge called it an "additional consideration").

On the other side of the analysis, Judge Evans presumed, at least as an initial matter, that factor four, the impact of the use on the market for or value of the original, always favored the plaintiffs, which is to say it counted against fair use.

Which brings us to the third factor, the amount used. This was the "swing vote" in most of the individual analyses, and the Judge applied a clear but quite narrow rule. Ten percent of a work was acceptable as fair use if the book had fewer than 10 chapters, and a single chapter was considered fair use for books that contained 10 or more chapters. This rule, which was applied quite strictly to decide if a "decidedly small" portion of the work had been used (that was the standard Judge Evans applied for this particular type of use), had some odd results; as little as 3% of a work was considered too much for fair use in a situation where the work was long and had many chapters.

But notice something important. When the third factor disfavored fair use, the factor analysis stood at two in favor (one and two) and two against (three and four). In those cases the Judge went on to do additional analysis, asking several further questions. Was the heart of the work used? (she declined to assume that all e-reserve uses involved the heart of a work) Was there a “readily available” license for reproduction of the excerpt *in digital form*? Were licensing fees an important part of the value of the original work in question? (Judge Evans held that they usually were not, so this was an important question).

The results of this additional analysis were what finally determined whether or not a use was fair if the third factor threshold the Judge had set was exceeded. When the amount used was within her guideline of 10% or one chapter, the availability of a license for digital distribution did not sway the analysis against fair use. And when a license for a digital excerpt was not available, the amount used was less important (although the leeway here is small, for Judge Evans).

If this rule about amount seems unduly restrictive, libraries would do well to remember three other findings from the ruling that impact how we might view this guideline. First, she held that percentages should be calculated based on the total number of pages in the book, which makes for a much easier and quicker determination of amount than the method of counting the plaintiffs sought. Second, she held that individual chapters by different authors in an edited volume should be counted by the same method and not as if each were an individual work, which also simplified the process of decision-making. Third, she rejected the idea that a use that was fair use in one semester must be paid for in a subsequent semester.

All three publisher plaintiffs, along with the two organizations (the Copyright Clearance Center and the Association of American Publishers) that bankrolled them, have now issued initial responses to the verdict. Overall their objections are quite vague. Several of the responses refer to legal or factual “errors” in the ruling, but they do not specify what they are. The [AAP](#) does disagree with the Judge’s finding that the loss of permission revenues because of fair use imperils their business; they repeat this absurd claim even after the Judge pointed out, based on figures supplied by the plaintiffs themselves, that these publishers made less than one quarter of one percent of their 2009 revenues from academic book and journal permissions.

All of the publishers assert that there is error in the judge failing to consider what the AAP calls the “full context” of the activities at GSU. [Sage](#) and [Oxford](#) (who issued identical statements) suggest a “pattern and practice” of infringement, while [Cambridge](#) refers to “systematic and industrial-scale unauthorized reproduction.” It is hard to know what to make of these assertions, other than that they arise out of sheer frustration. Since the Judge has just found that only five of the excerpts before her were infringing, “systematic” and “pattern” seem like inappropriate words. The Judge had to decide the case based on the specific allegations and evidence before her, and the plaintiffs were the ones who produced those allegations. So if only five out of 99 (or 75, depending on where you start counting) were infringing, no pattern of systematic infringement has been proved.

The Cambridge statement has the strongest hint of an appeal, saying that they look forward to working with their “partners” to “resolve this issue.” It also has the chutzpah to evoke “our authors” as victims of the ruling. How many times can we repeat what publishers hate to admit in public, that the vast majority of academic authors are not paid for their scholarly writings (by publishers, at least) and do not consider permission fees when deciding whether, what or where to publish?

So where do we go from here? We need to remember that this is only a District Court ruling, which is not binding on any university other than GSU, that no remedy has yet been ordered, and that it is likely to be appealed. Nevertheless, it is a carefully reasoned ruling with lots of specifics for libraries and universities to consider. Some institutions may decide that the Judge has defined a safe harbor and that they want to anchor there; in that case it is worth noting that some of the analysis she applies would be difficult to replicate without detailed financial information from publishers. More likely, schools will look at this ruling and tinker with their own policies a bit. Given both its substance and the still-early stage of the proceedings (really, even after 4 years and 350 pages this is not the final word), this decision is not, in my opinion anyway, a cause for large-scale or precipitous changes at most institutions, a fact that even the publisher statements seem to admit.

# Lobby the White House!

Wed, 23 May 2012 13:16:49, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]

Admit it. You seldom get a chance to lobby the White House, do you? Even if you write lots of letters on topics of public interest, most of them go to newspapers or to your local representatives. How often do you really get to bend Barak's ear? Here is your chance.

The White House has a petition program. Anyone can begin a petition, and it becomes visible and searchable on the WH site if 150 people sign it. If 25,000 people sign a petition in 30 days, the White House pledges that that petition will be circulated to appropriate officials (no, I cannot really guarantee that the President will read it) and an official response made public. Although 25,000 signatures does not sound too hard, most petitions do not come close.

On May 21 a petition went public that asks the White House to act to make the articles that arise from Federally-funded research — that is research you and I pay for — publicly accessible. Here is the text of the petition:

We believe in the power of the Internet to foster innovation, research, and education. Requiring the published results of taxpayer-funded research to be posted on the Internet in human and machine readable form would provide access to patients and caregivers, students and their teachers, researchers, entrepreneurs, and other taxpayers who paid for the research. Expanding access would speed the research process and increase the return on our investment in scientific research.

The highly successful Public Access Policy of the National Institutes of Health proves that this can be done without disrupting the research process, and we urge President Obama to act now to implement open access policies for all federal agencies that fund scientific research.

As many will recall, the White House Office of Science and Technology Policy did a public request for information on this topic, its second and more detailed such request, at the end of 2011. A report based on the responses to the RFI has been prepared and is circulating within the White House. This petition is designed to ask the White house to act on that report, which we believe is favorable to the idea of public access. In only two and a half days the petition has collected half of the necessary signatures, but it is important to keep the momentum going; it will be the 24,999th signature that will be hardest to get.

The technology blog Slashdot has this to say in support of the petition:

*"You paid for it, you should be able to read the results of publicly funded research. The National Institutes of Health have had a very successful open access mandate requiring that the results of federally funded biomedical research be published in open access journals. Now there is a [White House petition](#) to broaden this mandate. This is a jobs issue. Startups and midsize business need access to federally funded technology research. It is a health care issue, patients and community health providers need access, not a few scientists in well funded research institutes, and even wealthy institutions like Harvard are finding the prices of proprietary journals [unsustainable](#)."*



Note that this quotation links to the Harvard Library Faculty Advisory Council's memo to the faculty about journal pricing and suggests that the petition is one way to address the unsustainability of the current journal system. I cannot help noting, however, that the Harvard group did not say, in that memo, that Harvard could not afford the journals; they said something more fundamental. They said they were not getting sufficient value for the money they were spending under the current system and that their (substantial) resources could be better spent elsewhere. This petition, like the Harvard statement, is about increasing the *value*, the return on investment, that the public gets from its support of scientific research.

For an entertaining argument in favor of public access, here is a [fun video from Access2Research](#).

If you are a librarian and believe that the current system of disseminating research and scholarship is unsustainable, I hope you will read [this blog post from the ACRL](#) and consider [signing this petition](#).

If you are a researcher and want faster, better scientific information and collaboration, I hope you will consider [signing this petition](#).

If you signed the "Cost of Knowledge" Elsevier boycott, I hope you will consider [signing this petition](#).

If you are a student and want to keep the costs of your education from rising even faster, I hope you will consider [signing this petition](#).

If you are a businessman or entrepreneur and want to encourage innovation and job growth, I hope you will consider [signing this petition](#).

If you are a taxpayer and believe you should get what you paid for, I hope you will consider [signing this petition](#).

# Almost there

*Wed, 30 May 2012 12:59:53, ksmithl2@duke.edu, [category: open-access-topics]*

As I write this, the White House's "We the People" petition on [requiring online public access to scientific journal articles that arise from tax-payer funded research](#) is nearing 21,000 signatures after only 10 days. This is great news; since the threshold to bring this to the formal attention of White House policy makers and require a official response is 25,000 signatures in 30 days, we are really getting close. But we still need slightly more than 4,000 people to sign for this to happen; I encourage you to consider signing the petition, if you haven't yet, and to bring it to the attention to acquaintances who might be interested. For those who care about scientific progress, innovation, teaching and simply getting a reasonable return for the tax monies that are spent to support research, signing this petition should be an obvious step.

Public access to the results of federally-funded research is an especially appropriate issue for the White House to address in an election year, and we hope that this petition will lead to a robust discussion and concrete action. Offering a greater return on their investment in science to taxpayers ought to play well, of course. But so should the benefits of broadening and accelerating the audience for science, since those benefits include more innovation and jobs.

There is a nice short article about the reasons they support the petition on [Wikimedia's "News and Notes."](#)

To sign the petition you must create an account, which ensures fair play. All you need is your name and an e-mail address. Only you first name and last initial display on the petition, so there is no threat to privacy here. This is your chance to put a very worthwhile cause over the top.

# Publishers file response to GSU ruling

*Fri, 01 Jun 2012 09:45:24, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

Yesterday the three plaintiff publishers in the copyright infringement case against Georgia State filed their proposed injunction, as the Judge required that they do, and a memorandum of law in support of that proposal. So now we have a chance to examine their first legal response (as opposed to press releases) to the ruling Judge Evans handed down three weeks ago.

First a couple of comments about the memorandum of law. There is a statement in it which asserts that the May 11 order found enough infringement to justify imposing the *original* injunction the publishers suggested back before the trial. This is wishful thinking indeed, considering how many points the Judge has found in favor of GSU since that sweeping proposed injunction was offered. And remember, the Court found only 5 instances of infringement out of the 75 excerpts examined or 5 out of 95 if we count the ones considered at trial and subsequently withdrawn by the plaintiffs. But this hardly seems like a serious hope on the part of the three publishers, and the rest of the memorandum is spent explaining and defending the alternate proposal they offer, which is, they say, more narrowly tailored to track the Court's fair use analysis.

One other comment in the memorandum caught my eye — the assertion that the GSU policy “did nothing” to limit GSU's copying for electronic reserves to “decidedly small” excerpts. This is technically a true statement but seems to misrepresent the Judge's exact words and their implication (in fairness, the plaintiffs do quote those exact words later on). What the Judge did say was the the GSU policy did cause the infringement “in that it did not limit copying in those instances [the five infringements] to decidedly small excerpts as required by this order.” She does not say that the policy did nothing to limit the copying, only that it did not conform to an arbitrary standard which was not available to GSU when the policy was implemented. Hardly a culpable lapse, and the Judge does go on to say that the policy was a good faith attempt to comply with the law.

The phrase “in those instances” may be very important as this case proceeds, because much will turn on whether or not the Judge thinks the instances of infringement that she found rise to the level of “ongoing and continuous” violation of federal law. The publishers assert that it does, and use those words over and over. They need to make this argument in order to get an injunction that broadly proscribes future behavior by GSU. The exception to sovereign immunity on which this case is founded allows a court to issue an injunction only to prevent such “ongoing and continuous” violation. So it is possible that the Judge could decline to issue an injunction at all by ruling that the few infringements she found amongst the many excerpts she examined do not suggest a pattern of ongoing and continuous violation. Or she could simply order small tweaks to the GSU policy.

In their (alternate) proposed injunction, the publishers ask for much more. They want GSU to be enjoined from ever using *any* excerpts from Sage, Oxford or Cambridge works without permission unless a strict set of conditions is met. Those conditions include meeting all of the fair use factors (it would no longer be a balancing test), as they have been defined by the Judge, although the injunction combines factors three and four into a single set of requirements. The proposal says that, to be used by GSU without payment, any excerpt from these three publishers must be “strictly without charge for nonprofit educational purposes” AND be “narrowly tailored” to “fulfill a legitimate purpose in the course curriculum” AND not be the heart of the work AND not be more than 10% or a single chapter, whichever is less. Alternatively, if a digital license is not available from either the CCC or directly from the publisher

(they want GSU to pursue both options), the excerpt must still be sufficiently small “as not to cause actual or potential market harm to the work.”

These requirements are taken very closely from the analysis Judge Evans used, but they are shaped into a less flexible test than the Judge actually employed. For example, in the one case where the use of the “heart” of a work led to a finding of infringement by Judge Evans, that excerpt also exceeded her standard in terms of length (it was two chapters and 12.5%). Because the third factor did not favor fair use, the factors were tied, and the Judge looked at the issue of the centrality of the excerpt to break the tie. Thus she never actually asserted, as the proposed injunction would have her do (it connects length and centrality with a conjunction, not a disjunction), that an excerpted could be infringing if it was the heart of the work even if it was sufficiently short to meet her basic third-prong test.

The proposed injunction goes on to impose additional requirements on GSU, which look very like what was suggested in the publishers’ first proposal. GSU would have to rewrite its policy to conform with the publishers’ reading of Judge Evans’ ruling, and state explicitly that the fair use checklist had been superseded. They would have to document extensively, including evidence of an inquiry about a license made to both the CCC and the publisher for every excerpt. Faculty would be required to see the entire proposed order every time they tried to upload anything, and to be threatened with sanctions if they disobey it in any particular. The Provost would have to certify compliance to the Court each semester for the next three years. And perhaps most objectionably, GSU would be required to provide the publishers with access to its course management system so that they could verify compliance.

The proposed order is clearly intended to humiliate GSU and to make fair use as difficult as possible for them. It reads to me like a party who actually won very little at the trial still trying to spike the ball in the other parties’ face. I hope the Judge will see it as yet another attempt to overreach the evidence on the part of the publishers.

One thing I can say with confidence. If the publishers are given the right to poke around in GSU’s course management system, faculty will be outraged, at GSU and elsewhere. That outrage might lead some to look for “underground” methods for sharing academic readings, which would be unfortunate. It might also lead to difficulties in finding faculty authors who will be willing to continue to provide free content and free labor to these three publishers.

GSU now has 15 days to respond to this proposal, and then the Judge will decide what she will order. It is likely her order will not be exactly what either side wants, and that the case will then move to the Eleventh Circuit Court of Appeals.

# How to say goodbye to a University Press

*Fri, 08 Jun 2012 05:35:02, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies]*

Ever since the University of Missouri [announced on May 24](#) that it would end its subsidy of the University of Missouri Press, which seems to indicate its imminent closure, it has been interesting to listen to the reactions. As Jennifer Howard says in her [piece for the Chronicle of Higher Education](#), the response to this decision has been rather quiet, compared to howls of protests heard about earlier, similar decisions. But there are three types of comments in reaction to the announced closure that I have heard, and each, I think, misses the point to some degree.

First, nearly all of those who have criticized the decision do so on the basis of the fine books that the University of Missouri Press has published over its 50 plus years in business. The Press has published the collected works of Langston Hughes, Harry Truman and Mark Twain, for example. This is a distinguished history of which the University should be proud. But these books will continue to exist even after the Press ceases operations, and accomplishments in the past are not the point. The question is whether or not the Press is capable of matching those accomplishments in the future. The University seems to have determined that it is not. There will surely be high-quality books in the future, but they will have to find other publishers and, perhaps, different platforms.

Second, some of the critics of the decision have suggested that it is foolish to close the Press to save such a small amount of money — the \$400,000 per year that the University has been giving the Press for some time to cover its operating deficit. But the question should not be how much money, but what value is returned on the money spent. For its \$400,000, the University sees about 30 books published each year, which means each title is subsidized at a cost of over \$13,000. These are expensive books from the University's point of view, I imagine, and if this option is contrasted, for example, with the possibility of supporting three new tenured positions in literature, the value proposition looks quite different.

One rhetorical move that is very common in these debates is to contrast the small amount of press subsidies with the high salaries of football coaches on the same campus. While it has emotional appeal, this is a dangerous strategy because it highlights the value issue. For better or worse, universities are mostly convinced that they see a significant return on investment from athletics; some even argue in many cases that these programs are self-supporting and return revenue to the institutions. Demanding that universities take money from athletic programs to support presses may seem to have a certain high-brow appeal, but it emphasizes that some university presses cannot support themselves and do not provide, apparently, sufficient support to the universities' missions either. [A great deal more data about university sports subsidies and their relationship to library budgets can be found in [this Inside Higher Ed essay by John V. Lombardi](#).]

In her book *Planned Obsolescence: Publishing, Technology and the Future of the Academy*, Kathleen Fitzpatrick documents how university presses began their lives as places to publish the work done at their parent universities. Only after a period of time did they begin to demand autonomy to broaden their lists and retain their profits (see pp. 175-187). If they now are asking once again to be supported by those parent universities, presumably they must once again show how they support the specific mission of the parent. If they do not do that, the return on investment is inevitably going to seem insufficient.

Finally, there is one other reaction to the Missouri announcement that misses the point, I think. In his Chronicle blog post on [The Consequences of Closing University Presses](#), Frank Donoghue moves very quickly from mourning the loss to asserting that digital publishing is not the solution for university presses. Donoghue cites a ten-year old quote from Jenefer Crewe of Columbia University Press about how publishing costs are mostly due to human labor, so that digitally published books would probably lose as much money as printed ones do. This is hardly a comforting thought, and does little to make the case that universities should continue to support the traditional model, whether the books are published digitally or on paper. Indeed, it reminds me of the much older quote from Chester Kerr, long-time Director of Yale University Press, who said this back in the Sixties about university presses:

We publish the smallest editions at the greatest cost, and on these we place the highest prices, and then try to market them to people who can least afford them. This is madness.

So it seems that we have known for years that the business of publishing small editions of beautiful academic books was unsustainable. Even if digital publishing cannot reduce labor costs, surely it can reduce some of the expense of printing a book. I wish some one would tell us what percentage of the costs really are printing, shipping, marketing and storage, so that universities could begin to develop new models based on solid numbers. And Crewe's speculation includes costs for infrastructure that are surely lower today than they were ten years ago, as well as for "selling subscriptions to libraries," which might not be necessary if we think more broadly about the dissemination of scholarship.

The overall lesson here, I think, is that we need a broader conversation about how to distribute scholarship. Neither the traditional press model nor an entirely open access digital solution is likely to be THE answer, although each will almost certainly be part of the answer. Not all traditional academic publishers will survive, which is a reality both sad and necessary. Nor will all digital publishing experiments survive. But in both cases, some will, and as we move forward the best alternative is to be very transparent about costs, quality, service and value, and to be open to having diverse options striving, and sometimes thriving, side-by-side.

# A success, and a long road ahead

*Mon, 04 Jun 2012 09:01:26, ksmith12@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Last night the [We the People petition to encourage public access to the results of taxpayer-funded research](#) reached and exceeded its goal of 25,000 signatures, so we should expect a response from the White House. Thank you all who signed the petition! It is impressive to reach the goal in only half the allotted time.

If you have not signed, please do so anyway. The more signatures on the petition the clearer it will be that this is an issue the White House should embrace during this election year. And an ever-growing list of signatures will also help shape the response; we want substantive action here, not simply assurances of further study.

It is probably simply coincidence that on Friday the UK Publishers Association released a report purporting to show that public access to research articles after a six-month embargo, which is a move being considered by the seven [Research Councils UK](#) would result in large-scale subscription cancellations. A [press release linking to the report is here](#). The timing of the report is clearly intended to influence the RCUK; indeed, a [short comment](#) on the Publisher's Association website takes an extremely Chicken Little approach to the report, assuring policy makers that a six-month embargo from the RCUK would "cause publisher collapse."

Public access advocates have been asserting for a while that the harm predicted by publishers if taxpayers could read the results of research they funded was overblown. So now the Publishers Association has offered us evidence of a sort. But there are a couple of problems with the report that should prevent policy makers and the public from accepting its assertions too readily. And even after acknowledging that the report probably claims to prove too much, we might still ask, "so what."

One problem with the report is that it is based on an excessively simple survey. A single question was sent to 950 librarians, with 210 replies. The question was just this: "If the (majority of) content of research journals was freely available within 6 months of publication, would you continue to subscribe?" The problem, of course, is that there is insufficient context for librarians to make a reasoned response to this broad question. What is a "majority?" How available, and searchable, would these articles be? And continue to subscribe to what?

This last question is particularly important, because the Publishers Association lumped together those responses that said they would cancel everything, which is a very small number, with those who said they would cancel some journals. The two percentages are simply combined in the press release that announces impending disaster. But surely the publishers realize that some cancellations are going to happen regardless of public access, due to their own pricing policies. Libraries simply cannot continue to subscribe to everything when the prices of packages continue to rise at around 6% while library budgets shrink or remain flat. Whether those cancellations are selective or devastating really has more to do with how publishers manage their bundling. But public access is not the primary driver of cancellations, it is excessive price increases.

It is instructive that the report acknowledges that "more than one" librarian objected to the simplicity of the question and tried to provide a more nuanced reply. In those cases we are told that the responses were "carefully assessed" in order to decide which broad category to put them in. In other words,

attempts to introduce nuance, and no doubt especially to discuss bundling and price increases, were dismissed in order to jam the replies into predetermined categories constructed to point to impending doom.

So it appears that the question was too broad, attempts by respondents to be more specific were brushed aside, and then different answers (some, inevitable, cancellations v. sweeping cancellations) were combined to create a picture of disaster with which to frighten policy makers. But even if we acknowledge the flaws in this study, it is also useful to ask whether the result it predicts would really be a disaster.

The place to begin is with the recognition that neither libraries nor policy makers have an obligation to preserve a particular business model just because it has existed for a while, if it is not able to support itself in the face of rapid technological change. To say that scholarship will dry up if some publishers go out of business is simply not true; scholarship will continue and it will find new ways, and likely more efficient ones, to reach those who want or need to read and use it. This is already happening, which is why the publishers are so frightened in the first place. Transformational change is coming, and if publishers cannot find a way to adapt, we should not worry over much, at least not to the point of failing to experiment with new options. Certainly we should not let the prospect of traditional publishing becoming a smaller segment of the overall picture of scholarly communications dissuade us from adopting policies that will ultimately benefit researchers, students and the public.

The Publishers Association links this study to an argument that the only form of open access that should be encouraged is “Gold” OA, in which (sometimes) a fee is paid by the author in order for the work to be free for access for all readers. Certainly fully open access journals, which is the real meaning of gold OA, have an important role to play in the future. But note that only some of them are supported by author-side fees. The [new journal eLife](#), which hopes to rival Science and Nature, is supported by research funders and will not change publication fees. And these kinds of fully OA journals are quite different, one suspects, from what the Publishers Association means by Gold OA. They are most likely referring to open access to individual articles for which a special fee has been paid, while the other contents of the journal as a whole remain behind a subscription barrier.

In short, in their “embrace” of gold open access the Publishers Association is asking the public to pour more money into the inefficient system they have created, not less. Gold OA will be part of the short term future, I believe, which is the only future we can dare to predict. Green OA, including the kind of public access that both the White House and the RCUK are considering, will also be a part of the future, and is likely to prove the more sustainable option. But the hybrid OA model on which the publishers want to pin their futures must be only a transitional step toward full gold OA; it is not a sustainable approach for even the short-term long haul.



# Saying the right things, then doing them

*Wed, 06 Jun 2012 10:05:12, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

It is a sign of how behind I am in my reading that over lunch last week I finally got around to reading the [speech/blog post by Kathleen Fitzpatrick about “Giving it Away: Sharing and the Future of Scholarly Communications.”](#) It is an eloquent statement about how open access and the sharing of scholarship is really simply an extension of the core values of academia. In the process of making that point, however, Fitzpatrick, who is Director of Scholarly Communications for the Modern Language Association, covers a lot of very practical ground, and the speech brims with passages that elegantly express what many of us wish we had said.

There are three points I want to pull out from Fitzpatrick’s talk, because they are relevant to what else I want to talk about:

First, she very neatly expresses the key point about dissemination of scholarship in a digital age when she writes that “Open access ... is the cornerstone of the scholarly project: scholarship is written to be read and to influence more new writing.” She goes on to quote the [Budapest Open Access Initiative](#) to the effect that the very old tradition of scholars sharing the fruits of their research without payment has now converged with a new technology, the Internet, to permit much greater impact at lower cost. Access barriers that were necessary in the age of printed works simply are not needed any longer, and it is now more possible than ever to “share the learning of the rich with the poor and the poor with the rich.”

Second, Fitzpatrick makes a powerful argument that open access is not a threat to the humanities, but may be their best hope. She directly addresses the fear of a public who are often scornful of much of humanistic scholarship, which sometimes leads scholars to think about their audience as only a select group of fellow specialists. To this reaction she replies,

Closing our work away from non-scholarly readers, and keeping our conversations private, might protect us from public criticism, but it can’t protect us from public apathy, a condition that is, in the current economy, far more dangerous.

Improved access and impact, in short, are good things for both individual scholars and, ultimately, their disciplines.

Finally, Fitzpatrick also addresses the complaint that open access business models are not sustainable. She returns, by way of a response, to the argument Larry Lessig made some time ago that in the digital age it is not content that will be marketable as such, but services created around content that will be freely available. Since Lessig outlined this “freemium” model, its success has been underscored many times, by companies like Red Hat, Dropbox and WordPress.

This last point in particular was in my mind when I heard, shortly after reading the speech, that the MLA was [planning to change its publication agreement](#) with authors in order to allow them to retain their copyright and to self-archive their final manuscripts in open access repositories. It is great to see the largest of scholarly societies not only say the right things, but to put the values they espouse, which are, as Fitzpatrick reminds us, the basic values of the scholarly endeavor, into practice. According to [this article about the announcement in Inside Higher Ed](#), the immediate response to this change from

literary scholars has been very positive. And my favorite quote from that article reinforces Fitzpatrick's discussion of providing services rather than trying to monopolize content. In response to fears that self-archiving would undermine journal subscriptions, the MLA's Executive Director said this:

We believe the value of *PMLA* is not just the individual article, but the curation of the issue. *PMLA* regularly includes thematic issues or issues where articles relate to one another. While there will be value in reading individual articles, that does not replace the journal. Further, the individual articles posted elsewhere could attract interest to the journal.

The MLA's announcement, I think, poses important propositions that the scholarly world should consider. Time will tell how the move plays out, and, as a lawyer, I would like to see the text of the new agreement. But at least we can consider these three positive statements, rather than their negative counterparts that we so often hear, as the foundation of conversation going forward:

1. Open access is not only possible, but is even vitally important, in the humanities.
2. Open access, especially in its "green" form of author self-archiving, is not a threat to scholarly societies.
3. The value of organized publishing efforts is in the services they provide around the content, not in the content itself (which, of course, the publishers do not create).

In regard to the scholarly content created by academics, Fitzpatrick's speech is a reminder that closed-access publishing actually diminishes the value of such works, because that value depends on more readers and greater impact. Scholarship no one can read has no value at all, obviously. With their new publication agreement, the MLA is launching an experiment in increasing the value of literary scholarship by returning control over it to the authors. They, after all, are in the best position to make decisions about what forms of dissemination best serve their own interests and those of humanistic studies in general.

# How do you know?

*Wed, 13 Jun 2012 06:39:27, ksmithl2@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

It is hardly a surprise that my last few posts, dealing as they do with the economics of distributing scholarship and the potential impact of taking the issue of sustainability seriously across the board, would generate a good deal of criticism. My usual response to critical comments is to simply approve them for posting and let the criticism stand so that readers can make up their own minds. But there is one comment I do wish to respond to. Interestingly, it was not one that was posted to my blog at all, although it was dealing with [my post reporting](#) success on the White House petition for public access to taxpayer-funded research and criticizing the report from the Association of Learned, Professional and Society Publishers about the alleged impact of such policies.

The discussion in question was forwarded to me by a colleague, and was taking place on an e-mail list to which I do not subscribe (so I cannot post a link here). The specific challenge to which I want to respond related to my assertion that public access to scholarly articles is not the reason why libraries cancel journal subscriptions. A former publishing executive, in a longer e-mail, asked how I knew this and accused me of making an unsupported assertion. It is a fair question, and I am happy to report on how I know that public or open access is not the principal, or even a significant, driver of journal cancellations; doing so gives me the opportunity to link to a couple of valuable resources.

I know that public access is seldom, if ever, considered by librarians when dealing with subscription cancellations, first, because I have been a librarian for over twenty years and have been involved in or aware of a large number (larger than I would like) of cancellation processes. Never once have I heard a librarian say “we can cancel that one because all the contents are available on various websites.” First, that would almost never be true. Second, deciding on that basis would not be serving our patrons’ needs, which is what we strive to do even when our budgets contract.

The second reason I know that public access is not a big factor in journal cancellations is because I recently read the report prepared by Elliot Maxwell for the Committee for Economic Development on [The Future of Taxpayer-Funded Research: Who Will Control Access to the Results?](#) In that report, Maxwell takes a sustained and carefully documented look at many of the claims about the disasters that would befall for-profit publishing based on the National Institutes of Health public access mandate. His overall conclusions are, first, that there is no evidence that such policies have adversely impacted the STM publishers who complained so vociferously about them and have twice tried to push legislation to have them reversed. Maxwell makes two salient points. First, it is increasing prices, coupled with flat library budgets, that account for any rising rate of cancellations (which is the same point I made in my blog post). And second, that at the same time they were predicting disaster to policy makers, for-profit STM publishers were painting a more glowing picture of the future to financial analysts about the prospect of a return to 4-5% growth rates as we move past the economic downturn. As Maxwell says, “the last four years [he is referring to 2007 — 2011, a period which actually includes the worst of the downturn] have been marked by an *increase* in both the number and subscription prices of STM journals.” (p. 15) While this may not be good news for libraries, it certainly casts doubt on the gloom and doom being forecast if public access mandates grow. And it is further evidence that such mandates do not lead, contrary to the ALPSP report, directly to library cancellations.

Finally, the best evidence of the real reasons behind journal subscription cancellations is a more detailed survey commissioned by the publishing industry itself. One of the problems with the ALPSP report is, as

I said, that the question it asked was too vague and lacked context. As it turns out, the Publishers Communication Group did a [larger survey of cancellations between 2007 and 2011](#) that asked librarians about actual decisions they had made, rather than posing a hypothetical question. When asked why they made a particular decision to cancel a specific journal, the thousands of librarians queried listed four principal reasons — budget cuts, low usage, faculty recommendations and the desire to end subscriptions to the same content in different formats (cancelling print to focus on electronic access). These four reasons were cited for over 60% of the cancellations, while free public access was mentioned less than 5% of the time.

So this is why I think I know that public access does not directly lead to library journal cancellations. But this is really a side-issue. As I said in the original post, even if public access reaches a scale in which it does imperil journal subscriptions, that does not mean we should not pursue it. The evidence for the value of open access is becoming overwhelming, and the claims that it will harm scientific research (as opposed to for-profit publishing) or prove unsustainable are increasingly easy to refute. If I had my way (and I seldom do), the conversations about scholarly communications would move forward based on three broad principles:

1. Open access is beneficial for researchers, for scholarship and for society. We should be looking for ways to move toward more openness, not resisting those movements at every turn.
2. Sustainability is a valid question for all methods of distributing the results of research. It is unfair to complain that digital or open access models are not sustainable, but to ignore evidence of the same problem (such as the financial difficulties that led to the decision to close the University of Missouri Press) in regard to traditional publishing models.
3. Libraries are not (necessarily) seeking the end of publishing as we have known it, but they are seeking better ways to use their budgets to support teaching and research. The ideal situation would be a genuine effort amongst all the stakeholders to find the most efficient and sustainable ways to disseminate scholarship, and the partnerships between researchers, institutions, scholarly societies, publishers and libraries that will best move that goal forward.

# Sorry she asked?

Tue, 19 Jun 2012 07:59:23, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: libraries]

At the end of her massive ruling in the Georgia State University copyright case, Judge Orinda Evans directed the plaintiff publishers to file a proposed text and rationale for whatever injunction and declaratory relief they think is called for in light of the decision. She also gave the defendants time to respond to whatever the publishers proposed. All this is pretty standard for a case like this.

The publishers made their proposal a couple of weeks ago, and [I wrote about it here](#). Basically they suggested that enough infringement had been found to justify the extremely sweeping injunction they had originally suggested back in February, before the trial had been held. Perhaps recognizing that this was quite a stretch, they proposed an alternative that they said was more narrowly tailored to the Judge's actual ruling. In fact, their "compromise" position proposed to lump all of the different criteria that the Judge had considered in her careful balancing of the fair use criteria into one big pot and call them all requirements for any fair use. In short, they took criteria that the Judge considered as either/or and asked that they be made both/and.

Now GSU has responded, and the response could not be more different. Where the publishers suggest that their original, pretrial, "throw the book at them" injunction would still be appropriate, the defendants assert that no injunction at all is called for. It is probably not unusual for the two sides to have such divergent views about the remedy even after a ruling, but one has to think that, given that she has now been presented with the full range of options that were before her in the first place, Judge Evans wonders if it was worthwhile even to ask the parties in the first place.

The filing by GSU begins, appropriately in my opinion, by pointing out that very little infringement was actually found by the Judge in her May 11 ruling. The plaintiff publishers refer over and over again to "systematic and widespread" infringement; even their statements to the press contained this kind of language. Yet the Judge only found five instances of infringement out of the 99 excerpts that were at issue at trial and the 74 excerpts that she ultimately analyzed (25 were voluntarily withdrawn by the plaintiffs after trial). The defendants point out that not only is this not systematic and widespread infringement, it is not even the pattern of "ongoing and continuous violation of federal law" that is necessary to justify any injunction in this case.

Because Georgia State is a state institution, lawsuits against it in federal court are severely circumscribed. The Federal Courts cannot award money damages to a plaintiff, for example, because that would give those courts too much power over state treasuries. They can order injunctions, telling the state how to behave in the future, only when there is an "ongoing and continuous violation of federal law." The language comes from a Supreme Court case called *Ex Parte Young*, and Georgia State is asserting that that standard has not been met, not when so few infringements were found in such a large pool of excerpts examined.

GSU makes the point that this is a very small percentage, which represents the behavior of only 3 professors from amongst the 33 whose fair use decisions were challenged at trial. And they remind the judge that no copyrights at all that are held by one of the plaintiffs, Cambridge University Press, were found to have been infringed. For all these reasons, they argue that no injunction should be issued or, under the rules of *Ex Parte Young*, can be issued.

Instead, GSU essentially asks for a “declaratory judgement,” which is a binding statement from the court that establishes the rights of the parties without providing any enforcement mechanism. The basis for this request is that GSU has [already modified their copyright policy](#) in accord with the May 11 ruling. In these amendments they have addresses the two aspects of the 2009 policy that the Judge criticized in her decision. First, the revised policy now limits the amount of a work that can be used for digital course readings to 10% or one chapter, whichever is less. Second, they built in the idea that if a digital excerpt license for the work is readily available from the publisher or the Copyright Clearance Center, that availability weighs the fourth factor against fair use, and it tips the balance if more that 10%/one chapter is being used.

These changes track the Judge’s ruling quite closely. So GSU is arguing that, having amended their policy (which the Judge admitted was a good faith attempt to obey the copyright law in the first place) to correct the flaws the Judge found, all that is needed is a declaratory judgment that the policy now correctly defines fair use for the GSU faculty.

In this exchange of proposed remedies, the tendency of the plaintiffs to over-reach the evidence and make sweeping statements without justification has again been obvious. The proposal that the judge can bring the trial phase of the case to a close by simply acknowledging that the amended policy now conforms with her findings of fact and conclusions of law makes a great deal of sense. It might seem anti-climatic, especially given the size of that May 11 set of findings, but it is the sensible and prudent course. And, naturally, it will set up the next stage of the case — the inevitable, I believe, appeal by the publishers.

# Lions and tiger and bears, OA, or, scaring the children, part 1

*Thu, 28 Jun 2012 13:59:58, ksmithl2@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Earlier this week I had the delicate task of replying to a researcher who had applied for funding for open access publication fees and telling her that [our COPE fund](#) could not be used to support her article. The reason was that it was to be published in a journal that did not meet two of our basic criteria. In order to ensure that our limited funds are well-spent, we will only fund article processing fees for journals that are listed in the [Directory of Open Access Journals](#) and published by members of the [Open Access Scholarly Publishers Association](#). These criteria may be imperfect surrogates for quality, but they have served us well in striving to be sure that we support high-quality, sustainable OA publishing efforts.

Because we have these criteria, there was an objective reason for our decision to deny this particular application, since the journal did not meet either of the requirements I just mentioned. But I felt obligated to say more, so I forwarded the researcher a link to a discussion of whether or not the publisher in question was a “predatory” OA operation. The concerns were real, although the article did not ultimately decide whether the problems it listed were the result of an awkward start up or intentional deception. I told the researcher that she might consider a different venue, and I worried about her reply because I had been rather pushy, I thought.

The reply I received was both a relief and a surprise. The researcher thanked me for my concern, said that she understood the decision about funding, and clearly indicated her intention to proceed with the publication as planned. Her response got me thinking about the whole notion of predatory open access publishing. How, I wondered, should libraries especially, when they administer OA funds, think about the predatory problem?

First, I think libraries are right to raise the issue. We have always had a role in helping students and even faculty evaluate the quality of various publications, and doing so is an obligation when we are making purchase or other funding decisions, since we are obligated to spend carefully the funds our institutions entrust to us. I really like the warning, couched in a modest and restrained tone, found in [this blog post the University of Buffalo Libraries](#). We should not be condemning all open access publishing, or otherwise shouting about the predators all around us, but we do need to answer inquiries honestly and spend our monies wisely.

Which brings me to a second reflection. “Predatory” publishing is not exclusively an open access problem, and the problems included in that over-used phrase actually run the gamut from genuine attempts to defraud people to simple mismanagement. Before there were OA journals there were journals published in traditional fashion that were merely shells for certain industries or which otherwise had unacknowledged selection criteria that conflicted with scholarly quality. The victims of these types of journals were unwary libraries, who purchased subscriptions that ultimately ill-served their patrons and wasted scarce resources.

In an online age, criteria that are well-established in libraries for avoiding these predatory toll-access journals now must be shared more widely because researchers may unwittingly spend research funds on equally low-quality OA journals. But to call this an open access problem is to blind ourselves to its full scope and is, I fear, often motivated more by the desire to bring OA itself into disrepute, to “scare

the children,” as I like to call it, than it is by a desire to protect the entire system of scholarly communications. We should not allow FUD (fear, uncertainty & doubt), which is often spread by institutions that are trying to preserve the problem to which they see themselves as the solution (to paraphrase Clay Shirky), to narrow our vision of a sustainable system of scholarly publishing. The problem we should be addressing is predatory publications, OA and subscription-based, and publishing ethics across the board.

One reason I think this point is so important is because of the danger inherent in a wide-spread panic over predatory OA journals. The first source that alerted me to the potential problems with the publisher I was investigating earlier this week was a version of [Jeffrey Beall's list of predatory Open Access publishers](#). In the particular case the concerns expressed there were, I think, fully justified. But the version of the list I stumbled across (and which I cannot now locate) was, in my opinion, over-inclusive. It included, for example, the publisher [Hindawi](#). I note that none of the versions I can find this morning do include that publisher; I hope they have been removed from all such lists. My own opinion is that Hindawi is a perfectly legitimate publishing operation and it is one with which our researchers publish often and sometimes repeatedly.

As long as Hindawi meets our criteria for COPE funding, and it currently does, I will defer to the judgment of our authors when they choose to publish in those journals. And I will continued to be afraid that the hue and cry over predatory OA publishing will tar perfectly legitimate operations. The reason given for concern over Hindawi on the list I saw was that they publish “too many” journals. This is a highly subjective criteria, and it is really a legacy from older, print-based publishing. So I repeat, we should make our decisions about quality on the basis of neutral criteria that can be applied to any business model and not allow the legitimate concern over predatory practices to become a weapon used against only a single publishing option.

Finally, I think that there is a role here for deference to researchers, who are likely to know best what form of publishing suits their needs. It is perfectly possible that the advantages of open access publishing or any other particular publishing venue will, in the minds of individual researchers, simply outweigh some of the concerns we might express about a publisher, especially when those concerns are subjective or in dispute. The speed of research dissemination and the impact advantage that authors get from open access may make it a lot easier to overlook purely administrative problems, which probably plague any publishing enterprise in its first few years. The authors themselves, who know their disciplines best, of course, and also have the responsibility to manage their own careers, should ultimately decide where they want to publish, as the researcher I conversed with this week did. We need objective criteria and frank communication about real problems and concerns when we are expending the limit funds of our institutions. But that is very different from telling researchers that they cannot publish somewhere, which we should never do, in my opinion. It is also quite different from a panic or a witch-hunt or a FUD-fest, which will not serve anyone well.



# Dissertations for sale, or, scaring the children, part 2

*Sat, 07 Jul 2012 06:52:43, ksmith12@duke.edu, [category: libraries, category: scholarly-publishing, category: technologies]*

When The Chronicle of Higher Education published its “[Cautionary Tale](#)” about a dissertation discovered, by its author, to be available for sale on Amazon.com without his knowledge, it was bound to stir up another round of anxiety over how dissertations are distributed in a digital world.

In the particular case, the problem was that ProQuest, which creates the dissertation database once known as Dissertation Abstracts, now offers electronic copies of dissertations through outlets like Amazon. Authors have the option of preventing this (it is the default) when they submit their dissertations. To the article’s author, this was an unwelcome discovery. But two comments should be made about this cautionary tale. First, ProQuest, and its predecessor UMI, have always sold copies of dissertations; all that has changed is the format and the ease with which they can be found. Second, the most basic instruction for any author, whether of a dissertation or a best-selling novel, is to read the contract for distribution before you agree to it.

The bigger question is whether or not these sales, and more especially the online distribution of dissertations in open access repositories, which is becoming the norm at many institutions, actually prevent authors from getting their first book published. The author of the Chronicle piece seems to assume that it will, but such assumptions, without facts, seem to be the real problem. There are many expressions of fear on this front, and even a few stories of actual rejection which seem to be circulated endlessly. Fears, of course, are not facts, and students often repeat these fears and demand that universities cater to them based only on the anxiety of others. As for the handful of anecdotes, it is hard to know whether the rejection of a book in these stories really was caused by online availability of the dissertation, or by some factor internal to the work itself. To a large degree we are again dealing with FUD — fear, uncertainty and doubt — intended to frighten people.

It is not surprising that publishers would sometimes raise this specter even if they know it is seldom an important issue in actual editorial decisions. The simple truth is that the academic publishing industry has a vested interest in discouraging any online distribution of scholarship that it does not control. But it is useful to look at some of the sources behind the anxiety to see what they really say.

First is [this statement from the American Historical Association](#), which actually is quite moderate. Here is the key paragraph:

While there is no conclusive evidence that electronic publication can make it more difficult to publish a revised version of a dissertation, the division feels that students and their advisers should be aware of the possibility. Editors who had spoken about the topic at a 2011 annual meeting session and had subsequently been interviewed for an article in the Chronicle of Higher Education were divided on whether electronic publication differs significantly from older methods of making theses and dissertations available through interlibrary loan or on microfilm. Some editors stated that they would be more likely to publish a dissertation that had attracted interest online.

This is hardly terrifying stuff; the Professional Division of the AHA goes on to recommend that universities have policies regarding embargoes for online dissertations, and that authors and advisers know what those policies are. Perfectly sensible, even though it seems to ignore the first clause in the quoted paragraph: “there is no conclusive evidence that electronic publication can make it more difficult to publish a revised version of a dissertation.” Two phrases are key in that clause, I think: “more difficult” and “revised version.”

It **is** difficult to publish a scholarly monograph these days, and the market for books based on dissertations is shrinking all the time. Is this because of online, open access dissertations? I don’t think so. I think it is because library budgets are shrinking, more of the money must go each year simply to maintain journal subscriptions, and dissertation-based books tend to be very specialized and very expensive. I have never heard a librarian say that she would not buy a book because the dissertation version was in a repository somewhere; cost and the availability of funds are a fully sufficient explanation for the contracting market for revised dissertations.

Yet according to [this survey done by some leaders in the field of online dissertations](#), some publishers do express a greater reluctance to accept a manuscript if there is an online dissertation. Here I think the issue of revision is key. Note that many more publishers in the survey say that it is the degree of revision that makes a difference for them, and I believe that the small percentage that said an ETD could be a large factor were answering the question based on a scenario where they were presented with an unrevised, or lightly revised, manuscript. A much larger percentage, over 40%, either cited the difference between the two documents as a factor or indicated a case-by-case analysis; they recognized that the key factor was revision.

Revision of a dissertation before submission for publication is virtually a *sine qua non* today, and much more important than online availability (or suppression) of the original dissertation. Because of the market described above, an unrevised dissertation, which is always directed to the interests of a very narrow group of specialized readers, stands little chance of being accepted, regardless of whether it is also online. More importantly, there is no evidence, in my opinion, that a publisher would reject a well-revised dissertation that was otherwise marketable simply because an earlier dissertation by the same author and on the same topic was online. Availability as an ETD is an excuse, or a boogeyman, far more often than it is a real reason for turning away a marketable monograph.

So what is a dissertation author to do? First, relax, but plan to revise. Second, take the advice of the AHA and know the policies that will apply to you at your degree-granting institution and that prevail within your discipline. Third, use embargoes on your work when they really will help, both in ProQuest and at your local campus. Finally, read what you sign before you sign it. This last point is a life lesson that all scholarly authors should learn, not just those at the dissertation stage of their careers.

# Redefining research

*Mon, 16 Jul 2012 10:24:33, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use]*

The last month has seen extraordinary changes in the copyright law of Canada, including two Supreme Court decisions that I wish we could import south of the border to the U.S.

At the end of June a comprehensive reform of the Canadian copyright law known as bill C-11 received its final approval in the Canadian Senate and “royal assent.” It seems that this means C-11 is now formally the law in Canada, although according to University of Ottawa law professor Michael Geist the [reforms do not actually take effect](#) until after there is an “order in council” process that creates the new regulations around the bill.

This [new copyright reform](#) contains some very good news for education in Canada. I have not studied the bill thoroughly, but will note the handful of reforms that seem most important.

First, the exception to the exclusive rights of copyright in Canada that is known as “fair dealing” was expanded by the addition of three additional purposes to the two — research and private study — already mentioned in the provision. Those new purposes are education, parody and satire. The way fair dealing works, in order for a finding that an activity that implicated one or more of the exclusive rights was not an infringement because it was fair dealing, a court must first decide if the activity fit into one of the enumerated purposes, and then do an analysis to decide if that activity within one of the purposes was fair. The Supreme Court of Canada enunciated six factors that are used in this second step of the process, which really look a lot like US fair use. But the absence of education from the list of dealings that were eligible for a finding that they were fair (the first step in the analysis) was a significant problem for universities and schools. Bill C-11 remedied that problem, and it has really changed, I would imagine, the [debate over the license](#) for universities that has been offered by the collective rights group known as Access Copyright (which recently jumped in price from \$3.75 per student to \$26).

Another major benefit for universities in the bill, and another reason the Access Copyright license seems less worth the major increase, is that there is now explicit permission for instructors to show films and other works that can be performed to an audience of students on the premises of the institution. This, of course, sounds a lot like the US provision for face-to-face teaching found in section 110(1) of our copyright law. There are also new provisions in C-11 that explicitly authorize reproduction by institutions and their employees for the purpose of instruction and that address the rights of distanced students to receive lessons via “telecommunications.” There is a helpful summary of the [impact of C-11 on education here](#), from the British Columbia Library Association.

Less than two weeks after the royal assent to bill C-11, the Supreme Court of Canada ruled on five copyright cases that had been before it. Two of those cases had major implications for the definition of “research” in the fair dealing provision which is outlined above. Collective rights organizations had challenged two practices — Access Copyright had asserted that teachers making copies for students was outside the scope of fair dealing, and a music licensing organization called SOCAN had made the same assertion about short preview clips of songs that consumers could listen to before buying the complete piece. Both organizations were seeking additional licensing fees for the challenged practices, and both lost.

In her opinion, Justice Rosalie Abella significantly expanded the definition of research, following a 2004 Supreme Court decision that had stated that the word should be read expansively. She ruled that those short music clips should be encompassed as research, recognizing that the term can encompass casual information seeking in addition to formal academic study. And she held that the private research of students does not require that they actually make the copies; that research and researchers can be guided by a teacher without giving up their rights under fair dealing:

With respect, the word “private” in “private study” should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the concept of studying, the Board again artificially separated the teachers’ instruction from the students’ studying.

Another important part of these decision about instructional copying is that Justice Abella found little or no harm to the market for published work caused by this copying. The excerpts copied were short, forcing students to buy the entire books was unrealistic, and there was no link demonstrated between this copying and any evidence of declining textbooks sales. This sounds quite a lot like Judge Evan’s conclusion in the Georgia State case that permission income for publishers was of negligible importance and that there was no evidence that the permission fees lost because of fair use actually threatened the well-being of publishing businesses. I hope we are seeing the beginnings of an international consensus around the idea that limited copying for educational purposes is more important for societies to support than a small additional revenue stream for publishers is.

The reason I really like this expanded definition of research in Justice Abella’s opinion is that it gets at the heart of the analogy issue that was central to the Georgia State case. The plaintiff publishers in that case wanted the court to accept a strict analogy between electronic reserves and the commercially printed course packs that were found not to be fair use in the Michigan Documents Services case, while many of us argued that, in the absence of a for-profit copy shop’s involvement, the better analogy was physical reserves, where a copy of a work is made available for students to use (in this case by downloading into their own computers) or not. By tying the copying done by an institution to the private study purpose of the individual students, Justice Abella makes this latter argument for us. In cases like Georgia State (and the UCLA streamed video case) the law clearly allows individual students to view and even to copy works for private study. In both situations, technology simply enables the same group of students to use the materials in essentially the same way, but at their own convenience. Instructors are, as Justice Abella puts it, simply guiding the students to the resources which they will then use for their private research.

US courts are often quite reluctant to be seen to be influenced by international law. But at the very least, this ruling from the Supreme Court of Canada shows the plausibility of the analogy that sees traditional, allowable educational activities simply being transferred to an online environment. The change in technology should not entitle rights holders to additional fees any more than, in Canada, the human inter-mediation of a teacher does.

# Now we see through a glass, darkly

Wed, 25 Jul 2012 11:16:15, ksmithl2@duke.edu, [category: uncategorized]

When *U.S. News and World Reports* runs a [major article on academic journal publishing and the open access movement](#), it should be pretty clear that there are big changes afoot. And the past couple of weeks have seen major developments in the movement toward public access for taxpayer-funded research, both here in the U.S. and in Europe.

In the U.S., the two groups most vigorously supporting public access, the Scholarly Publishing and Academic Research Coalition (SPARC) and the Alliance for Taxpayer Access, recently sent a [letter to the White House](#), urging it to act on the “We the People” petition that many of you signed two months ago supporting taxpayer access and accountability. We are still waiting for a response, which the White House promises whenever a petition can gather 25,000 signatures in 30 days (it only took 2 weeks in the case of public access). We can hope, of course, that the White House’s delay is caused by the effort needed to develop a comprehensive policy, but I personally wish we knew one way or another.

Much of the letter from SPARC and ATA details the recent developments in the UK and EU, especially the announcements last week from both the [Research Councils UK](#) and the [European Commission](#) of plans to move rapidly toward public access for all funded research articles. Both groups will allow a six month embargo on scientific articles and a twelve month embargo for those in the humanities and social sciences. The reason for bringing these details to the attention of the White House is that public access is an important issue of competitiveness and economic growth. If the U.S. does not want to continue to fall behind the rest of the world in terms of scientific research and innovation, this is a vital step to take. As the SPARC/ATA letter says,

This approach [public access after short embargoes] is rapidly becoming the default mode for countries that want to retain a competitive advantage in R&D, in science, and in the translation of ideas into new products and services.

So the challenge for the Obama administration is to decide if such competitiveness is important to the U.S., or if protecting legacy industries will take precedence.

In the U.K this same debate has been in the foreground since the release of the “[Finch Report](#),” named for Dame Janet Finch who chaired the task force that wrote it. That report comes down pretty firmly on the side of protecting legacy industries by stating that the only appropriate path to open access is that of paying article processing fees to traditional publishers so that articles can move from behind subscription barriers but publisher revenue streams are protected.

Not surprisingly, the STM publishers immediately [endorsed the Finch report](#); if they have to have open access, they naturally want to ensure that they are the ones who get paid to provide it. But the report’s myopic focus on only one form of open access has not gone unchallenged. This [detailed response from SPARC Europe](#) points out many of the gaps in logic and evidence that plague the Finch report (referred to as “a thumbs up for open access but an expensive way to get there”), and suggests a more balanced approach that recognizes that many different business models are underway and that we should not put all of our eggs in one basket. The RCUK took that message to heart, it seems, since their announcement, made only shortly after the release of the Finch report, clearly rejects the latter’s one-sided approach. Instead, RCUK will give its researchers an opportunity to select the business model for publishing that works best for them — either publication in an open access (for which article processing fees may be

charged but are by no means inevitable) or by self-archiving in a publicly accessible database (so-called Green Open Access, which should not be called, as the U.S. News article does “quasi-open access”).

In this debate we see why some of the issues raised in the *U.S. News* article are so important. The largest message I got from reading that article was that we need a lot more transparency about the costs of publishing a single academic journal article. At one point the Executive Director of the American Physiological Society is quoted as saying that the per-article cost at his journal is between \$2,500 and \$3,000, a figure he uses to ridicule the idea that upfront money from academics could replace subscription income. But why does it cost that much?

The author-side article processing fees for many Gold open access journals are substantially lower; at Duke, where we have a fund to help reimburse some of these costs for our faculty, the average fee we support is around \$1200. Before any government commits to paying article processing fees to traditional publishers, we need much more clarity and transparency about what costs those fees support. The *U.S. News* article makes the point that many of the costs cited by publishers seem rather mysterious. Content in academic journals is not paid for, of course, and peer-review is almost entirely also done by volunteer labor (supported by university budgets!). The author of the piece goes on to list other costs like editing and formatting, but points out that these are borne by non-academic publishers as well, who also manage to pay their writers.

It is worth noting that on the few occasions when we get solid numbers about the costs and profits of academic publishing, the numbers do not seem to add up. An industry financial analyst for Deutsche Bank [pointed out some time ago](#) that if publishing academic articles costs as much as legacy publishers say that it does, the 30 — 40% profit margins they enjoy would not be possible (see the quote associated with footnote 19 in the linked article). And in the Georgia State lawsuit, where the judge was able to compel the plaintiff publishers to produce some real numbers, she rejected entirely the claim that profit margins were so slim that permissions income was a make-or-break proposition for academic publishing.

So the big question for governments and funders as they consider how best to support the transition to public access is why some traditional publications cost so much (and would pass those alleged costs on to taxpayers) while Gold OA journals and Green self-archiving seem to be more cost-effective alternatives. A lot of additional transparency would be required before recommendations such as those in the Finch report could be taken seriously. Fortunately, the RCUK and the EC seem to be moving in a more sensible and sustainable direction.

# The prevailing party

Sat, 11 Aug 2012 07:24:46, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]

Since the ruling in the Georgia State case in May that decided, at the trial court level, the substantive issues of the claimed copyright infringement, I have been telling people to wait for a while before deciding to take any strong action based on that ruling. The case, I keep saying, is far from over. There is likely to be an appeal, for one thing. But even prior to an appeal, I wanted to encourage people to wait for Judge Evans' ruling on the remedy — the steps she would order to fix the handful of actual infringements that she found (five) out of the large number of claims that were submitted to her (ninety-nine, at trial). The remedy would tell us, I have been saying, how the Judge sees her own ruling. After all, in their filings since May the two sides have claimed to find radically different things in the Judge's decision; her ruling about a remedy is her chance to tell us what she thinks the impact of her findings of fact and conclusions of law really should be.

On Friday the Judge [filed her order on declarative and injunctive relief](#), and she clearly told us who she thinks won the case. The prevailing party is Georgia State University.

Judge Evans addressed both declaratory and injunctive relief in her ruling. In her declaratory ruling, she announced three principles intended to clarify points in her earlier order that the plaintiff publishers. They are helpful for understanding her ruling, but not startling, I don't think:

1. The holding that excerpts must be “decidedly small” in order for the third fair use factor to favor the use applies to all excerpts assigned from a book for a particular course in the aggregate. This merely tells us that “an excerpt” means the total amount assigned from a single book; it presumably rules out the possibility of putting one chapter on reserve for a while, then replacing it with a second chapter later on and asserting that only one chapter ( at a time) is being used. I doubt that many universities would be willing to resort to this trick, but the Judge has explicitly disapproved of it.
2. The analysis of fair use by Judge Evans does not apply to books that are intended solely for classroom instruction. The Judge seems to be telling us that there is a more restrictive standard for fair use of textbooks than the one she applied in this case, but she also uses a pretty narrow definition of a textbook. None of the works that were at issue in this case fall into that category, she says.
3. Fair use in the context of e-reserves and course management systems is conditioned, she tells us, on strict controls over who can access the excerpts — only students registered for a class — and on notice telling those students that they may not further distribute the excerpts. I hope this is already our practice in higher ed.

Interestingly, the Judge also adds a “cautionary note” that is outside of her declaratory findings because, presumably, it goes beyond that matter strictly before her. She notes that where digital licenses were not available from publishers, the fourth factor favored fair use and, in such cases, allowed excerpts longer than her strict definition of “decidedly small.” How long, we might ask, and the Judge tells us that the longest excerpt she allowed, at 18.5 %, is near the limit of fair use. So much beyond that point, in her opinion, fair use will not apply even when the other factors seem to support it. It is helpful for the Judge to tell us this, although other courts might find that this approach puts too much weight on a

single factor. Certainly such a limit has been rejected by higher authorities in cases where the use was found to be transformative.

When she turns to the matter of an injunction, the Judge rejects the very broad, “highly regimented” injunction sought by the plaintiffs. She feels such restrictive rules, with record-keeping requirements and monitoring, are unnecessary, given that GSU policy was a genuine attempt to comply with the copyright law and that its application resulted in so few actual infringements. Instead, she limits her injunction to an order that GSU maintain policies consistent with the May 11 ruling and the one from Friday, and that they disseminate those policies to faculty and staff. To the best of my knowledge, GSU is already doing those things.

The stunner in this order comes at the end, when the Judge must rule on the requests from each side to have the other pay for the costs and attorney’s fees of both. The Judge must first decide who was the prevailing party. She recognizes that both sides won on some points, but overall she holds that GSU was the prevailing party. Even so she does not have to order the publishers to pay GSU’s costs and attorney’s fees, but that is exactly what she does. She reminds us that of the 99 excerpts over which claims were made at trial, 25 were withdrawn by the publishers and for another 26 the publishers were not able to clearly prove that they owned the copyright. Also, there were 33 excerpts for which permission for digital excerpts was not available even if it had been sought. Because of all these situations where the infringement claims were implausible from the beginning, the Judge holds that the plaintiffs “significantly increased the cost of defending the suit.” And on that basis she orders that the publishers pay the reasonable costs and attorney’s fees incurred by Georgia State.

Early on in the case I wrote that the Copyright Clearance Center, which financed half of the plaintiffs’ costs, was using litigation as a marketing strategy. Now I hope that the CCC and the others behind this case would learn that that strategy was both counterproductive and much too costly. Unfortunately, I expect that rather than learn that lesson, they will “double down” on an appeal and, in the process, throw more money that should be spent on supporting new publishing away on the ill-advised project of trying by force to increase permission fees for works that have already been published and sold.



# Wormwood gets a job

Mon, 27 Aug 2012 07:33:02, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]

In his classic book *The Screwtape Letters*, C.S. Lewis imagined the correspondence between Wormwood, a young apprentice demon, and his uncle, an older and more experienced tempter named Screwtape. Uncle Screwtape advises Wormwood on how best to corrupt human kind, and the book has become beloved as a kind of reverse moral theology. One can learn a lot about human foibles and weaknesses by reading how Screwtape and Wormwood conspire to exploit those weaknesses and lead humans ever deeper into corruption.

But what if Wormwood took a job? As an academic publisher? What would Screwtape advise him to do? How best could he sow fear, uncertainty and doubt? How best to exploit the weaknesses and vanities of academic authors and the hand-wringing timidity of librarians? In this [vision of the correspondence between Uncle Screwtape and the newly-employed Wormwood](#), Amherst College Librarian Bryn Geffert imagines that they would hit upon pretty much exactly the practices we actually see today. His reworking of *The Screwtape Letters* was published as an essay in *Inside Higher Education*, and I link to it here because it really is too good to miss — deadly accurate and very funny.

Interesting, I think, to compare the correspondence between Wormwood and Screwtape with this actual [dialogue about academic publishing going on The Economist website](#) about whether and to what degree academic publishers add value to the work they sell. I wonder if we will see similar arguments on both sites, the fictional parody and the serious debate.

Thanks to my friend Gary Draught for pointing out Geffert's essay on [his blog about Open Access called Alpha Omega](#).

# Examining an “essential” copyright

Sat, 01 Sep 2012 15:16:25, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: libraries]

The article has been all over the news media, which is unusual for something about copyright. In my RSS feed from a Google search for copyright issues it has appeared at least a dozen times, based on different newspapers that have run it.

What “it” is, is an article from the Associated Press about copyright and the film preservation efforts at the Library of Congress. Here, for example, is the [article on the website of the San Francisco Chronicle](#), and [here it is again from the Seattle Post-Intelligencer](#). The article alternates between talking about the LoC’s film preservation project and about copyright protection for film. The latter is involved, ostensibly, because Congress added motion pictures to the list of protected subject matter in August of 1912, so the article ran on roughly the 100th anniversary of that legislation.

Here is a key sentence from the article, which contains the quote from which the word “essential” in the headline is taken and also some of the confusion of two issues that concerns me:

“Copyright was essential from the very beginning of the industry,” said Patrick Loughney, chief of the Packard campus, a former Federal Reserve bunker... that has been converted into a state-of-the-art archive. It is a dual safe-haven, intended to protect both the film’s creators and establish a collection that outlasts a film’s box-office haul.

What strikes me as curious is how these sentences are related. What, specifically, is intended to be this safe-haven that is referred to — copyright protection, or the underground preservation vault? It is that apparent confusion (toward the end of the article a little bit of light dawns on the issue) that got me thinking about what role copyright plays in the preservation of film.

As a preliminary matter, it is worth noting two points.

First, although the headline says that copyright protection for film is turning 100, that is the anniversary of the legislation; copyright protection itself does not normally last that long, and many of the films being discussed, or that are stored in the vault, are likely to be out of copyright protection and in the public domain.

Second, the role of copyright, and the 1912 addition of motion pictures to the statute, in the earliest development of the film industry is much more ambiguous than this article suggests. For one thing, the earliest films were registered for copyright well before Congress acted; they were simply registered as sets of photographs. Thomas Edison was the first to register a film (of a man sneezing) in this way, in 1894. Filmmakers were thus able to get copyright protection, if they wanted it, eighteen years before Congress acted. The Third Circuit Court of Appeals upheld the validity of this type of registration in a lawsuit, brought by Edison, in 1903.

But if copyright protection was available prior to the 1912 legislation, its impact may not have been as great as the quote above suggests. In his book [Hollywood’s Copyright Wars](#), from which the facts in the previous paragraph are taken, Peter Decherney makes the case that the earliest film executives, who began by suing each other over patents and copyright, usually ending by forming associations and

arriving at agreements that were much more important to progress than legal enforcement measures were. This turn toward forms of self-regulation often was the real move that proved vital to innovation and growth; statutory rights and judicial decisions merely set the boundaries that the industry payers then renegotiated.

Now we come to the central issue — what is the role of copyright protection in preservation? Toward the end of the article we finally get an indication of why the two things have been tied together this way, when Mr. Loughney is quoted saying that copyright “has a practical function. The physical depositing ... of material creates a national archive that can live on for future generations.” So copyright supports preservation because of its mandate that registered works be deposited with the Library of Congress; it is not the exclusive rights themselves but this “add on” requirement that seems to be the key. This may indeed be true, but the registration requirement has never been strictly enforced, and under our current regime of automatic protection, registration and deposit rates are minuscule compared to all that is created.

And, of course, actually preserving the materials that are deposited might well have been easier were it not for copyright protections. The article notes that many early films have been lost, and specifically mentions that nitrate films were not preserved because the medium was so flammable. One solution to that problem, of course, would be to make copies of those films to a different, less volatile medium. But to do that might infringe the exclusive rights of the copyright holder. This is a dilemma that librarians and archivists encounter all the time; copyright creates uncertainty and risk around reformatting, and thus hinders many preservation efforts. Old films are lost, even today, not just because they were made on materials that deteriorate, but also because excessive copyright enforcement is too risky to make the needed investment in reformatting.

Copyright has certainly been important to the developing film industry, but in a very ambiguous way, as Decherney shows. It is quite possible that many films were made that would not have been started but for the assurance of copyright protection. And the deposit requirement has allowed the LoC to amass an important collection. But it is also true that many early filmmakers were able to get started in business because they could “dupes other people’s films (just as the early publishing industry in the US often depended on piracy of British works). And it is true that the collection the LoC holds might be even more valuable if copyright protections had not, and did not even today, prevent or deter reformatting for preservation.

# A not-very-appealing appeal

*Tue, 11 Sep 2012 09:44:23, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries, category: scholarly-publishing]*

To the surprise of no one, I think, the plaintiff publishers in the Georgia State litigation filed a notice of appeal on Monday. There has already been considerable coverage of this decision, in, for example, [Inside Higher Ed](#), the [Chronicle of Higher Education](#), and [Library Journal](#).

The actual Notice of Appeal is a very dull document; it merely lists the orders from the District Court with which the publishers take exception, and “respectfully give[s] notice” of the intent to appeal. The real action yesterday was in the press releases, and there the publishers respect for the District Court was much less evident. Indeed, there is a good deal of anger, and some crocodile tears, in these public statements. The plaintiffs in this case have always shown more skill when crafting dramatic press releases than they have with persuasive legal arguments. It is worth looking at some of the statements from the public statements to assess, primarily, the legal arguments the publishers plan to make, and also their motivations.

First, the [Association of American Publishers’ statement](#) asserts that, “There is no legal basis for according less copyright protection to printed books and articles when portions are made available in digital form rather than bound into hard-copy coursepacks.” Of course, the District Court made no such differential treatment; it is their inability to see the distinction between the coursepack cases and the situation with library reserves that undermines much of the publishers’ thinking in this area. At least two cases have found that coursepacks printed for colleges and universities by commercial copy shops do not get much scope for fair use. But Judge Evans’ ruling that there is more scope for fair use when libraries or professors share digital excerpts has nothing to do with any difference in format; it is simply a recognition that the circumstances that the law tells us are relevant in a fair use determination are different in the two situations. With Georgia State there was no commercial entity making the copies and no charge leveled for access to them. None. That is a huge difference between GSU and the coursepack cases; it is directly, massively relevant to the first fair use factor, which disfavored the copyshops but favors Georgia State.

In other words, Judge Evans did not draw an impermissible distinction, as the plaintiffs allege. She simply did what the law tells her to do; she analyzed the specific circumstances around the challenged uses. She did it meticulously and arrived at reasoned conclusions based on the facts before her and the factors outlined in the law.

The AAP goes on to claim that the District Court ignored a “lengthy pattern and practice of widespread infringement” and “ignored the forest for the trees” by conducting its inquiry into each challenged excerpt. Again, this statement indicates a profound misapprehension of how fair use works. It is precisely intended to be a careful examination of the circumstances around each challenged use. And the results of that analysis disprove the claim of a lengthy and widespread pattern of infringement. Judge Evans found only occasional and scattered instances of infringement.

It is difficult to know how the plaintiff publishers think the Court should have proceeded differently. How do you discover a pattern of infringement if you don’t examine each specified use to see if it really is infringing? How do you locate a forest without knowing what a tree look like? To extend the metaphor, the publishers and the Court do not disagree about whether or not there is a forest, they

disagree about what kind of trees make it up; where the publishers see infringing yew trees (a symbol of mourning and loss), the Judge saw, mostly, fair use oaks.

In the conference call with reporters that the plaintiff publishers held, reported in the Chronicle article above, there was a lot of talk about how unhappy the publishers are to have to continue their lawsuit against academic libraries. They professed an allegiance to the principle of fair use that I find extremely disingenuous — whatever they could mean by fair use in that statement, it is not recognizably the right created by section 107 of the U.S. copyright law — and they once again asserted that the District Court ruling would cripple them financially. The President of Oxford University Press is quoted as saying that the decision would “cut us off at the knees” because of their “razor thin budgets.” There are many public facts that disprove this statement, not least of which is the [25% increase in profits OUP reported in 2011](#) or the [116 million pound “surplus”](#) it reported in 2012. More importantly, Judge Evans had access to specific sales and profit numbers, and found very clearly that permission income was almost never a significant factor for these publications. These factual findings of a District Court are reviewed on appeal under the standard that “clear error” must be found to overturn them, so this argument is a loser in court, I am convinced, even while it remains popular in press releases.

In short, what we saw on Monday was more of a tantrum than a legal argument. The Copyright Clearance Center has made it clear that they will continue to help fund this case on appeal (an appeal is a lot less expensive than the initial trial), so more money from libraries will be used to sue libraries. All the professions of regret and concern for authors still ring hollow; it is interesting that Sage claims to have consulted “textbook authors” about continuing the suit, yet no textbooks *per se* were involved in the case and it is not clear that the judge would apply the same analysis to textbooks as she did to the works at issue. If the publishers had spoken to the authors on my campus who write the books and articles they publish, I am confident they would have heard a different story. For ordinary academic authors, permission royalties are trivial and not an expected part of the publishing “deal” (which is no deal at all for them). This is not about protecting authors; it is, as it always has been, a marketing ploy, especially for the CCC, that aims to compel libraries to give an even larger share of their budgets to these publishers, and the groups that are financing them, without getting any new scholarship for that money.

# GSU and university presses

*Mon, 17 Sep 2012 14:01:35, ksmithl2@duke.edu, [category: libraries, category: scholarly-publishing]*

One of the most disheartening things about the ongoing lawsuit against Georgia State University by three large publishers is the support the plaintiffs are getting from the university press community. Presses, of course, rely on fair use all the time, and smaller presses need it even more, since neither they nor their authors can usually afford lots of permission fees. So supporting this lawsuit seems to be contrary to the interests of smaller academic presses.

As I have said before, if the CCC and these three large presses (including the two that have the word “university” in their names) succeed in forcing libraries to spend more of their budgets on licensing fees (that are unnecessary under the current state of the law), it is presses themselves that will suffer. That money will come out of most libraries’ collection funds, so there will be less money available to buy new monographs. That undoubted fact will disproportionately harm university presses, many of which depend on publishing specialized monographs, which will be the first things cut (as they usually are). Unfortunately, this is an area, often the only one, where libraries have some flexibility to adjust expenditures, and cutting highly-specialized monographs results in much less wide-spread complaints from campus communities.

It may well be that large operations like Oxford and Cambridge University Presses can rest assured that the net gain from forcing more permission fees will offset any losses in sales for new works. But I doubt that Small State University Press can be as sanguine. The fee income they will gain will be much smaller, and the sales losses will have a much greater impact. One way to look at this case is as a side-long attempt by some big players in academic publishing to force smaller competitors out of business. Yet many academic presses (but almost certainly not all) are cheering Oxford and Cambridge on from the sidelines, apparently out of the forlorn hope that someday SSUP might become as rich as they are. Instead, they are being led off a cliff.

This all was brought home to me the other day, when a friend forwarded an e-mail to me that had been sent to the directors e-mail list of the American Association of University Presses. In it, a university press director (I won’t say which one) encouraged colleagues who support the appeal in the case and disagree with the original decision to express that opinion by commenting on stories about the appeal in the higher ed press. It is interesting that only those who support the appeal were asked to comment; I can’t say if there are no university press directors with a different opinion or if they were just being told to keep their thoughts to themselves. But here is the line that first made me laugh, for obvious reasons, and then got me thinking:

So far it’s the Kevin Smiths and Paul Courants who have yelled the loudest from the library side, with a deafening silence from our side

It was rather unsettling to be identified in this way as a depersonalized representative of “the enemy” whose voice needs to be countered. I certainly do not object to having other people, with many different opinions, encouraged to join the debate. But two things do trouble me about this quotation.

First, there is the clear assumption that university presses and university libraries are on opposite “sides.” It did not have to be this way. Most libraries are not engaged in large-scale infringement, just reasoned and reasonable fair use, in spite of the plaintiffs’ rhetoric in the heat of litigation. And libraries did not institute this suit. So how did we get here?

For me, part of the answer lies in the evocation of Paul Courant as the other representative of the “other side.” Paul is in rather a different position than I am; he is the former Provost of the University of Michigan, and now, as the University Librarian, he is the person to whom the University of Michigan Press reports. When he is made into the archetype of the enemy by a university press director, it seems clear to me that some presses, at least, have drifted a long way from their fundamental anchor in the scholarly mission(s) of their parent institutions.

One aspect of this lawsuit, and perhaps a key factor that brought it about, is this disconnect we are seeing between some university presses and the academic values of their parent institutions. Libraries are at the heart of the university mission, and the continuing recognition by academic administrators that a great library is a *sine qua non* for a great university is one reason why so many of them seem disappointed by the decision of publishers to sue libraries. By electing to treat libraries as adversaries instead of allies, some presses demonstrate how far they have traveled from the core purpose of supporting the research and teaching mission of their universities. Instead of dismissing or disputing the point of view of a provost or a university librarian, perhaps these presses should spend more time talking with those officials. At many places those conversations are well underway and quite fruitful. Where they are not, it may be time for the academic administrators to insist.

# How do you recognize a catastrophe?

*Fri, 21 Sep 2012 08:57:36, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

When a financial analyst uses the term “catastrophic” in regard to the impact of open access on publishing giant Reed Elsevier, it is bound to attract some attention. In a September 10, 2012 report from the firm Sanford Bernstein, senior analyst Claudio Aspesi did just that, and the reaction has been predictable. “Catastrophe” has been in every headline (including mine!), from [those that seem a little gleeful](#) at the idea of bad things happening to the publishing company so many academics love to hate, to [those that wish to defend](#) the conglomerate.

Thanks to the kind permission of Mr. Aspesi, the [complete report can be accessed here](#).

It is worth noting how the word is actually used in Aspesi’s report. In assessing the overall prospects for Reed Elsevier, Aspesi notes that they are very dependent on the high profit margins at Elsevier, the academic publishing arm, so that a reduction in those profits might be “catastrophic” for the parent company. He then goes on to explain why open access, specifically gold open access with the anticipated shift from subscription-based revenues to article processing fees (APCs), seems to threaten that high profit margin. In the past, Aspesi has recommended that Reed Elsevier should spin off other parts of its company to reduce its exposure; a [call that the company has rejected](#).

The bottom line for investors in the Berstein report is that the company rates Reed Elsevier to “underperform,” and pegs the target stock price at \$6.45. As this [comparison report](#) shows, other analysts put the target stock price somewhat higher.

To me the most interesting part of the report is its discussion of where article processing fees for gold open access journals are likely to go.

The fundamental conclusion in Aspesi’s report is that for Elsevier to maintain its current revenue through a complete transition from subscriptions to APCs — for that transition to be “revenue neutral” for Elsevier — the APCs charged to each author for publishing in an Elsevier journal would have to increase about 70%, from current levels (for open access) at about \$3000 per article to about \$5,145 per article. Aspesi does not think the market would bear this increase, and in that I think he is surely correct.

This discussion of APCs is fascinating, and there are several nuances we can add to it. First, Aspesi notes that an option for Elsevier to maintain revenue in the OA transition without raising APCs this high would be to publish more articles. The move to online certainly makes this possible, but the option has significant drawbacks, especially for a firm that depend heavily on its “brand” (as do university tenure and promotion committees). Another possibility would be to recognize that not all journals are equal and charge differential APCs, based on the desirability of publishing in that particular title. This raises the possibility that scholars would begin to shop around for journals with lower APCs for those articles that are not accepted into the top-tier journals. We have not had much competition in the area of scholarly publishing in the past, but as different publishers charge different APCs, and those fees might even, perhaps, vary within one publisher’s titles, this possibility of competition, where cost and reputation are balanced together in the decision about where to publish, could grow.



In explanation of his conclusion that even with higher APCs it would be difficult for Elsevier to maintain its high revenues, Aspesi cites a simple fact — in the OA world, journal bundling would no longer be possible. At present, Elsevier and others are able to sell lower-readership journals as part of “big deals” and at no additional cost to the company. The OA world, however, imagines that each journal would have to stand on its own bottom, with revenue dependent on how desirable publication in that particular title is. Aspesi’s discussion of what OA “big deals” might look like — various models for offering universities better pricing or “all you can eat” agreements for open access publishing — is fascinating but concludes that it would be very difficult to reach such deals and that they would not solve the problem of needing to increase APCs to cover costs.

One additional problem with increasing APCs for Elsevier journals, which returns to the issue of competition among journals, is the likelihood of downward pressure on APCs just as the transition would seem to force established traditional publishers to raise them. The growth of OA megajournals like PLoS One, which already charges a much lower APC for articles it publishes than Elsevier does for its “sponsored articles,” may create such downward pressure. So might some of the new models for open access, like [eLife](#), which is supported by research funders and will not charge APCs, or [PeerJ](#), which is building a membership model for OA.

The key to this analysis, and the problems it poses for Elsevier — whether catastrophic or not — is the cost per article. Aspesi bases all of his projections on the assumption that it costs about \$3,200 for Elsevier to publish each article, or, more significantly, \$1200 per article submitted (850,000 submitted articles versus 316,000 published). Many fully OA journals do not have such high costs, which is the reason they can charge lower APCs. Aspesi acknowledges that Elsevier may be an expensive organization to run (not run on a “shoestring,” he says), but does not explore how or if those costs per article could be reduced. Yet it seems to me that that is the key for survival for traditional publishers if they are to weather the transition to open access.

We can experiment with as many different pricing and funding models as we like, and I hope there are a lot, but we fundamentally need to have a conversation about how much it costs to publish a single scholarly article. Those costs have been hidden in the byzantine structure of subscription prices and bundling, especially from the larger publishers. That model has allowed great opacity about actual costs, and for years universities have accepted that situation, which has now become clearly unsustainable. But as we make the transition to open access, and gold OA plays a large part in the new paradigm, it will be harder and harder to avoid being open and honest about how much scholarly publishing really costs, and how some groups seem to be able to do it for so much less.

# The six million dollar fair use standard

*Tue, 02 Oct 2012 07:31:50, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: libraries, category: scholarly-publishing]*

The trial judge in the Georgia State copyright infringement lawsuit filed her final judgment in the case yesterday, bringing that portion of the lawsuit to a close. The only news left for this final order was the amount of money that the plaintiff publishers would be forced to pay to Georgia State. Judge Evans had already ruled that GSU was “the prevailing party” and therefore entitled to have the other side pay their fees and costs, and a lot of motions were filed arguing over what those numbers would be. The final amount (including both attorney fees and court costs) is \$2,947,085.10.

Based on the way these things usually turn out, Georgia State and its lawyers probably think this number is too low. The publishers and their lawyers undoubtedly think it is too high. The result is that it is probably a reasonable estimate of what it actually cost **one side** to litigate this case. So if we want to estimate how much it cost to get us where we are today, that estimate would be about six million dollars, assuming that the plaintiffs spent approximately the same amount that they must now pay to the defendants.

And please do not forget; half of that money is coming from the Copyright Clearance Center, a corporation that says it acts on behalf of scholarly authors and to whom universities pay large sums of money. Our own dollars — lots of them — are being used to bring this lawsuit to squeeze more dollars out of us.

The result of all this expenditure, thus far, has been a judgment that gives us what the publishers originally said they wanted. The Judge has articulated a reasonable fair use standard. It is too rigid for my taste, and too permissive for the publishers, but it is not unreasonable. If it was left to stand, nothing much would change, except that we would have a greater degree of confidence if we confined our fair use assertions regarding the provision of digital course readings to the boundaries Judge Evans has set. Doing that would cause some institutions to pay less for permission fees, and some to pay more. Some schools might push the boundaries a little further, but we probably would not see the widely different interpretations of fair use in this context that we sometimes find today. Other schools would still find that this risk is too great and continue to stay out of the e-reserve business all together.

To my mind this would not be a terrible result, although it would have cost a terrible amount of time and money to get there. We could all probably live in a world where Judge Evans’ ruling was the last word in this case.

Unfortunately, the publishers are unwilling to live in such a world; they have already announced their intent to appeal, and they now have thirty days to file that appeal in the 11th Circuit Court of Appeals. The only excuse for their decision is the desire to force universities to pay even more money than the already do to publishers. Prices are not rising fast enough, apparently, so greater income from permissions is required. If other parts of the educational mission of universities have to suffer, that too is price the publishers seem willing to pay.

We can no longer preserve the illusion that all this was about was to provide some certainty about fair use for digital course content. The publishers spent 6 million and now could walk away with a workable, if unpopular, standard. Instead the battle against universities and higher education will continue. How sad.

# Questions about the AAP Google settlement

*Fri, 05 Oct 2012 08:17:17, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

There have been quite a few stories about the news that Google has settled with the Association of American Publishers in its long-running lawsuit alleging copyright infringement in the Google Books project. There are stories in the [NY Times](#), [Chronicle of Higher Education](#) and [Inside Higher Ed](#).

As all of the stories note, the terms of the agreement are confidential, so we really do not know much about what has happened. So there is very little to say, and most of it is grounded on uncertainty. To a sensible person that would suggest reticence, yet here I am writing a blog post about the settlement. My modest purpose, however, is to address three questions that I have heard, in order to lower expectations about what has happened.

First, How is this settlement related to the earlier one that caused such a fuss and was ultimately rejected by the Judge?

The answer here is that it is not really related. That proposed settlement was a “class” agreement that would have bound essentially all authors who owned a copyright. It was because of its sweeping scope that it had to be approved by the Judge, and because that scope was too sweeping that Judge Chin rejected it. This settlement, on the other hand, is just between the named plaintiffs — several large publishing houses — and Google. It makes the publisher half of the lawsuit go away (the Authors Guild is continuing with their part of the litigation), and it sets terms for how Google will deal with books from those publishers. It does not have any impact on relations between Google and any other authors or publishers, although it acknowledges what has really been the case all along — that Google will withdraw materials if a publisher asks and will enter in to agreements with individual publishing houses.

Second — What does this settlement say about fair use?

As far as we know, the answer is that it says nothing about the key issue in the lawsuit — whether or not the Google digitization for the purpose of creating an index and providing a “snippet view” of in-copyright books is fair use. That issue is still being litigated, with the Authors Guild as the plaintiff. For the publishers, there apparently is some language about how much of a book Google can display; it is more than mere snippets, but it is not clear to me how that permission relates to other provisions of the settlement. In any case, the settlement does not, and cannot, decide the fair use assertion. In terms of fair use, we know no more today than we did yesterday, before the settlement was announced.

Third, how is this settlement related to the Georgia State decision?

Once again, the answer is that there is no direct relationship. The settlement is not really about fair use, but rather avoids the question that was addressed directly in the GSU case. The only relationship is that the AAP, which was a plaintiff in the Google case and has now settled to avoid continued litigation, is also bankrolling half of the litigation costs in the ongoing GSU case. One could speculate that the AAP decided to settle with Google because it wanted to avoid another case where fair use was affirmed, or that the cost of the GSU case, especially after the plaintiffs have been ordered to pay nearly 3 million in fees and costs incurred by GSU and where an appeal has just been filed, caused the AAP to decide on a strategic retreat from the other, probably more expensive, case. But both of those possibilities are pure speculation. In fact, the length of time that settlement negotiations usually take make it unlikely that

recent events had a direct causal relationship to this settlement, but it is certainly possible that the overall trajectory of the GSU case over the past three months was a partial motive for the AAP move as quickly as possible to settle with Google.

In short, I think there is very little to see here. I am glad when litigation is settled, as a general principle, because I think agreements are usually better, and more efficient, than lawsuits. And the educational benefits of the Google digitization efforts are important, so I am glad a little of the pressure has been taken off of those efforts. But this news of a settlement in the publisher half of this lawsuit is worth only a smile and a nod of approval, I think, before we turn back to the day-to-day struggles of higher education in a digital age.

# A big win for fair use and libraries

*Thu, 11 Oct 2012 04:35:52, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

What a stretch of four months it has been!

First, in July, we had the ruling in the Georgia State lawsuit affirming that most of the excerpts for teaching that were challenged as copyright infringement were actually fair use. The decision is being appealed, but libraries go in to that appeal on the winning side, which is always the better place to be.

Then, last week we learned that the lawsuit filed against UCLA over digital streamed video had been dismissed for the second time. The dismissal, so far, is only noted in the minutes taken by the Clerk of the Court during a hearing, which are filed in the docket. So we do not know why the case was dismissed, although it seems to be the same reasons the first one was — because the groups bringing the suit either do not own the rights they are trying to enforce or already granted a license broad enough to cover the use they now object to. More importantly, we do not yet know if the dismissal was with prejudice or without, meaning whether or not the plaintiffs will be allowed to refile the case again.

But tonight is the big news, in the lawsuit brought against the HathiTrust and five of its university partners by the Authors Guild, several foreign associations similar to the AG, and a handful of named authors, including Fay Weldon and J.R. Salamanca. In that case, Judge Harold Baer of the Southern District of New York has ruled on various motions for judgment on the pleadings and summary judgment, and he has completely vindicated Hathi and the libraries.

A [copy of the ruling is here](#).

A lot is happening in this opinion, which I will try to sort out briefly.

First, the plaintiff's motion asking the Court to rule that fair use was not available to the libraries as a defense, alleging that because libraries had the benefit of the specific section 108 exceptions they should not also be able to assert fair use, was denied. The Judge spent comparatively little time on this ridiculous claim, which flies in the face of the clear language of section 108 itself. He entirely rejected the argument and dismissed the claim.

Second, the Judge ruled on a motion for judgment on the pleadings (also called judgment as a matter of law) raised by the defendants (the libraries and HathiTrust) that asserted two things. First, it argued that the copyright law does not allow associations like the Authors Guild to sue on behalf of its members. On this argument, the Judge agreed as to the US association (the Authors Guild), but held that he would not foreclose a foreign association from bringing a suit because of our treaty obligations. The second argument was that the whole issue about the Orphan Works project proposed by HathiTrust was not "ripe" for a decision because nothing had been done as of yet. The Judge declined to decide that there was a risk of infringement until and unless the project got underway. So on this motion, the defendants won two-thirds of their arguments and the one they lost, about associational standing for foreign organizations, turns out not to matter.

Because the real news is that the Judge granted the defendants motion for summary judgment on the issue of fair use. Judge Baer found that the arguments made that the mass digitization project and the

Hathi Digital Library was fair use were so strong that he made the decision without a trial, on summary judgment.

The Judge did a four factor analysis to arrive at his conclusion, and it is worth looking at that analysis.

On the first factor, Judge Baer first held that the purpose of the use was research and scholarship, which are favored in the fair use statute. But he went on to hold that the use of these copyrighted materials in HathiTrust was also a transformational use. Unlike Judge Evans in the GSU case, Judge Baer cited case law that has determined that a use can be transformational because it has a different purpose, not only when an actual change in content has been made. And providing a searchable database of books, within copyrighted works only available to the visually-impaired, was, in the Court's opinion, transformative.

Because the purpose was transformative, the Judge held that the second factor about the types of works involved, was not dispositive, since transformative works of even very creative productions (like "Oh, Pretty Woman") have been held to be fair.

On the third factor, the Judge said that the amount used, even where entire works were scanned, was reasonable to accomplish the purpose.

Finally, the Court found that the issue of market harm did not undermine fair use. There is no direct market competition between the HathiTrust and any existing market for the works in question. And as for the argument that HathiTrust foreclosed a potential licensing market, the Judge said that rights holders were not allowed to preempt transformative uses because of a potential market.

At the end, Judge Baer concludes with this sentence:

I cannot imagine a definition of fair used that would not encompass the transformative uses made by the defendants and would require that I terminate this invaluable contribution to the progress of science and the cultivation of the arts that at the same time effectuates the ideals of the ADA.

As the last part of this comment indicates, the Judge also upheld the provision of digital files to persons with visual disabilities to facilitate adaptive access, using a combination of fair use and section 121 of the copyright law. Hard to believe that the AG thought it was a good idea to challenge that practice, but they did. So overall this is a comprehensive win for the libraries and for the important public interest that they serve.

This opinion follows a clear line of reasoning in fair use cases over the past three decades, and it applies that reasoning squarely to library services. I have bemoaned these lawsuits in the past, but I have to admit that I am beginning to feel grateful for them. The string of opinions that is now taking shape ought to give librarians a great deal more confidence when they are making reasonable applications of fair use. Where once I feared a chilling effect, I am now sensing a warming glow.

# Three things open access is not

*Tue, 16 Oct 2012 07:36:40, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Lots of news stories and emails flying around about open access in the past few weeks, and as I tried to think what theme might bring them together, I realized that I wanted to talk about three things that open access is not. Here they are:

First, open access is not more prone to abuse than other types of publishing. We hear a lot about “predatory” open access journals, and recently we have also heard a lot about fraud and retracted articles from traditional journals. We need to connect the dots and realize that both systems can be abused, just as all systems devised by human agents can be.

Consider, for example, this [story from the Chronicle of Higher Education](#) about a researcher who apparently faked nearly 200 scientific studies. The journals he published in were not top-of-the-line, but they were respectable, traditional subscription-based journals that libraries all over the world pay for. The principal journal mentioned in the article, *Anaesthesia*, is published by Wiley-Blackwell and is part of the journal package that my library buys. Were we the victims of a predatory subscription journal, or just of an increasingly slipshod system that often fails to live up to the claims made for top-notch editorial work? Either way, the difference between the failures at *Anaesthesia* and those for which OA journals are sometimes blamed does not seem all that significant.

Indeed, reform of the system by which scholars are evaluated and rewarded is exactly the recommendation of [this New York Times article about the rise in scientific retractions](#), and that accords nicely with some of the changes OA journals can facilitate. After detailing the really alarming rise in retractions, the article quotes suggestions that one way to combat fraud is to stop evaluating scholars simply on the number of papers they publish and the reputations of the journals in which they are published. They do not directly address the question of why these journals, with all of their professional editorial staffs, do not initially catch the fraud, which is increasing at a faster rate than the number of scientific articles is. But their recommendations point in the same direction the OA movement has been going for a number of years — away from a focus on impact factors, which only rate journals, and towards a more flexible and article-based set of metrics that actually relates to the specific article and to the nature of its impact. More about this in a minute.

The second thing that open access is not is just one thing. Recently I have seen a lot of debate about what is and is not open access. Much of this debate has centered on the Finch Report in the UK, which recommended a rapid transition to open access publishing of research results, but put a heavy emphasis on gold OA, and specifically that subset of gold OA in which publishers are supported by article processing charges paid in advance of publication. You can see [one example of the debate this has caused here](#).

Note that I said that charging article processing fees is a subset of gold open access. Much gold OA happens without such fees. Some fully OA journals are simply supported by organizations, whether those are published by scholarly societies, by libraries (Duke’s are [here](#)) or by major funders such as those that support [eLife](#). Also, the new journal [PeerJ](#) is trying a different experiment in gold open access, financed by memberships. Finally, the [recent announcement about the SCOAP3](#) effort to flip the financing for all of the prominent journals in high-energy physics shows that radical new experiments somewhat different from those on which the Finch Report was focused can succeed.

The diversity of these forays into open access are important, and in my opinion there will be lots of different styles of open access for some time to come. After all, the most effective effort at improving access to funded research in the US so far, the public access policy of the National Institutes of Health, relies to some extent, at least, on green open access, and never depends upon or requires the payment of article processing charges. One of the reasons I especially like this [new tool from SPARC, called “How Open Is It,”](#) is because it allows one to evaluate openness on a variety of factors, and seems to recognize that openness is an ambition and a process, not one specific definition.

Failing to keep the diversity of open access efforts in mind leads to some unfortunate conclusions. In a [recent statement](#) the American Historical Association “voiced concern” that open access would not work for the humanities and social sciences the way it has for the natural sciences. This is a common complaint, but the myopia on which it is based is especially obvious in the AHA statement, which cites the Finch report and is focused entirely on “author pays” models of open access. Nowhere does the AHA statement consider that green open access would produce significant benefits for historians without the difficulties about which the AHA is wringing its collective hands. Perhaps this failure to see the whole picture is part of the reason that the AHA’s own flagship journal, the American Historical Review, does not facilitate author self-archiving, allowing only the pre-print versions of articles to be made accessible, which is nearly never an acceptable option for historians. If the AHA really wants to keep up with the inevitable future, it needs first to change the policies at AHR. The results, I predict, would help facilitate the transition to other models for history publishing.

The third thing that open access is not is just a business model. In all the debates about which form of OA is best and how each form can be financed, we can lose sight of the fact that more than how we divide up a pot of money is at stake here. Open access is also a statement about the values of scholarship; an attempt to introduce more transparency into the process of research and to encourage greater participation in its creation, financing, and evaluation. Which gets me back to better metrics for assessing the quality and impact of scholarship. The movement called AltMetrics is one of the most exciting thing about open access; it is a chance to use new tools to study the impact of specific articles on a more granular level, yet across a much wider field.

At Duke, we are very excited to have one of the pioneers in the move toward AltMetrics, Jason Priem, who [co-founded](#) the [ImpactStory project](#), coming to speak in our Library for Open Access week. Jason will talk on October 22 on “Altmetrics and the decoupled journal: an endgame for Open Access.” His talk [is described here](#). Jason’s lecture is open to the public, and we hope many people — anyone with an interest in where the future of scholarship is headed and how we can break out of the cumbersome and unreliable system of evaluation that has accreted over the years — will attend.



# Coming clean on technological neutrality

*Tue, 23 Oct 2012 07:12:13, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: technologies]*

It is not a case that draws much attention from higher education circles, but the case of WNET et al. v Aereo has drawn an [amicus brief that should worry anyone](#) who is interested in how copyright law serves or inhibits innovation and competition. What is most disturbing is that the gross misunderstanding of how copyright law is supposed to work has come from former U.S. Registrar of Copyright Ralph Oman, now a “Professional Lecturer” in IP at the George Washington law school.

The case is brought by television broadcasters against a service that offers to take broadcast TV off the air and stream what it receives to its online subscribers. I have no opinion on the merits of the case, although it is interesting to note, as this [outraged post](#) about Oman’s brief does, that the service was carefully structured to try to remain within the boundaries of the law as the courts have interpreted it. And, as someone who has long wanted to “cut the cable,” I might be interested in the Aereo service if it is upheld. But it is not the arguments or the merits that should concern us, it is the approach that former Registrar Oman takes in his brief on behalf of the plaintiffs. Here is the central quotation that is so troubling:

Whenever possible, when the law is ambiguous or silent on the issue at bar, the courts should let those who want to market new technologies carry the burden of persuasion that a new exception to the broad rights enacted by Congress should be established. That is especially so if that technology poses grave dangers to the exclusive rights that Congress has given copyright owners. Commercial exploiters of new technologies should be required to convince Congress to sanction a new delivery system and/or exempt it from copyright liability. That is what Congress intended.

This is an extraordinary statement, suggesting that the Copyright Act was intended to force all innovators to go to Congress before beginning any service that might threaten some established form of exploiting the rights of copyright holders. It is a recipe for economic suicide in a digital world, apparently willing to sacrifice the gains we can make through rapid innovation, new markets, and online opportunities to the goal of protecting the legacy industries from any need to adjust their business models.

More to the point, the law is not silent or ambiguous on how new technologies and business that are built on them should proceed. Registrar Oman starts his brief by stating that,

There can be no serious dispute as to whether rights under the Copyright Act are broad, subject only to specific, narrow limitations enacted by Congress and that new developments in technology are not supposed to be able to truncate those rights.

To make this statement, Registrar Oman conveniently forgets fair use, which is not mentioned once in his brief. Now I do not know if a serious fair use defense was raised on behalf of Aereo (they are apparently in the Appeals Court over the refusal of the District Court judge to grant a preliminary injunction). But fair use is in our law, even if Registrar Oman (who helped draft the 1976 Act) apparently does not like it. In fact, it is the first of the exceptions to the exclusive rights that is listed in the Act, and it is not specific and narrow. It is deliberately open-ended and flexible, giving our law space to accommodate new technologies (like the VCR) and even new business models (like Google). Apparently

Registrar Oman wants to ignore fair use, and would prefer to force each of those new technologies and businesses to go to Congress for explicit permission before offering their products and services. How much economic growth and how many new jobs would be lost if Congress and our courts took this approach?

The real problem with this brief, or perhaps the place where it is most honest, is that it seems to completely jettison the argument that copyright law should be technologically neutral. It is ironic because the content industries often use that assertion to suggest that precedents from the print environment should be applied, when they are favorable to those industries, directly to digital activities. For example, the plaintiffs in the Georgia State case used the claim that copyright is supposed to be technologically neutral to support its analogy between what GSU was doing with electronic reserves and the earlier cases about printed coursepacks. In fact, the plaintiffs in that case even [complained that the judge had applied a different standard to digital copies](#), which was nonsense. At that point, technological neutrality was a battle cry. But now, when such neutrality would seem to favor Aereo, Registrar Oman argues on behalf of the rights holders that every new technology should be treated differently, presumed to be illegal, and subjected to legislative scrutiny before being allowed. What has happened?

The most obvious difference is that in the GSU case, the rights holders thought that the argument about technological neutrality would help them. They hoped the Judge would ignore the distinction between the coursepack cases, in which a commercial intermediary was involved, and the entirely non-profit, educational situation at GSU. By asserting that “the same law” applied in print and in the digital realm, they were hoping to obscure a substantive difference behind a rhetorical smoke screen. As I have [noted before](#), talk of technological neutrality is often more of a rhetorical strategy than an actual commitment. In the *Aereo* case, the law as it stands looks more favorable to Aereo’s business model, so this brief on behalf of the rights holders takes a new and shocking tack by asserting that every new technology should be presumed to be infringing until proven otherwise. Registrar Oman seems to be saying that we should not even try to apply the current law to new situations, but to presume that new technologies are always bad things and make their proponents argue their case to Congress before any new innovation is allowed.

The problem, of course, is that the GSU plaintiffs were right; the law really is supposed to be technologically neutral. The same law is supposed to apply in both the print and the digital realm. Where the GSU plaintiffs were wrong was in the application, not in the principle they stated. And where Registrar Oman is wrong is in suggesting that we cannot even try to apply the law to new technologies. The presences of fair use in our statute is testimony to the intention to give US copyright law the flexibility to adapt to new technologies, so it is no surprise that the former Registrar can only make his argument by ignoring its existence.

Technological neutrality is something that copyright laws need to strive for, because it is what avoids the need to make large-scale changes in the law every time a new technology — the player-piano, the radio, or the video recorder — comes along. But it is a goal from which the law often falls short. As Tomas Lipinski [argues in this article](#), the control that the content owners want to assert over digital uses has had the effect of undermining the principle of technological neutrality. It is a compelling, and distressing, argument; if one needs additional evidence for it, one need look no farther than the radical proposal made by former Registrar Oman to treat each new technology with suspicion and presumptive condemnation. Presumably Oman’s brief is just another strategy, made to assist a particular plaintiff and with no thought about the consequences his argument would have as policy. Because those consequences would be disastrous.

# Is the Web just a faster horse?

*Fri, 26 Oct 2012 08:21:42, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies]*

On Monday the Duke Libraries celebrated Open Access week with a talk by Jason Priem that was ostensibly about alternative metrics for measuring scholarly impact — so-called AltMetrics. Jason is a Ph.D. student at the University of North Carolina School of Library and Information Science, a co-author of the well-regarded [AltMetrics Manifesto](#), and one of the founders of the Web tool called [ImpactStory](#). In addition to his public talk, Jason gave a workshop for a small group of people interested in how ImpactStory works; you can read about the launch of that tool in [this article](#).

So Jason is as qualified as anyone to talk about AltMetrics, and he did so very well. But his talk was much broader than that subject implies; he really gave a superb summary of the current state of scholarly communications and a compelling vision of where we could go. For me the most memorable quote was when he said, toward the end of his talk, that the Web had been created to be a tool for scholarly communications, yet while it had dramatically changed many industries, from bookselling to pornography, it had not yet revolutionized scholarly publishing as it should. The problem is that publishers, and, to some extent, authors, are treating the Web as simply “a faster horse” and not truly exploiting the possibilities it offers to change the way scholarship is done.

Jason began with some history, pointing out that the earliest forms of scholarly communications were simply direct conversations, carried out through letters. The first scholarly journals, in fact, were simply compilations of these sorts of letters, and you can still see that venerable tradition reflected in some modern journal titles, like “Physical Review Letters.” But the modern journal, with its submission process, peer review, and extremely delayed publication schedules, was a revolution and a dramatic re-visioning of how scholars communicated with one another. Certainly there were significant gains in that new technology for communication, but things were lost as well. The sense of conversation was lost, as was immediacy. Now, according to Jason, we have the ability to recapture some of those values from the older model.

Another dramatic change in scholarly communications was the movement called “bibliometrics,” which led to the creation, in the early 1960s, of the citation index and the journal impact factor. Like the journal itself, the impact factor is so ingrained in our current thinking that it is hard to remember that it too was once a new technology. And it is a system with significant problems. As Jason said, the impact factor can track only one kind of person, doing one kind of research by making one kind of use. The impact factor cannot track non-scholarly uses of scholarly works, or even scholarly uses that are not reflected in another journal article. Also, true social impact, the kind of policy-changing impact that many scholars would see as an important goal, is seldom reflected in an impact factor. The problem we face, Jason argued, is that we have confused the kind of use we can track with use itself. In the process we often miss the real heart of scholarship, the conversation.

In the digital age, however, we can begin to track that conversation, because much of it is taking place online. AltMetrics, by which we teach computers how to look for a variety of article-level citations and discussions, offers the chance to analyze the scholarly environment much more thoroughly, and give individual scholars a much clearer and more comprehensive story of their real impact.

One connection that was hard for me in Jason’s talk, but ultimately persuasive, was his discussion of why Twitter is important. I admit to being a reluctant and unenthusiastic Twitter user. This blog post

will be distributed via Twitter, and most of my readers seem to find what I write that way. But still I was startled when Jason compared Twitter to that earliest form of scholarly communications, the conversation. What was new to me was to think of Twitter as an opportunity to have a preselected jury suggest what is important to read. If I follow people whose work is interesting and important to me, and they are all reading a particular article, isn't it extremely likely that that article will be interesting and important to me as well? And isn't that peer review? We sometimes hear that peer review is professional evaluation while Twitter is merely a popularity contest. But Jason challenged that distinction, pointing out that if we follow the right users, the people whose work we know and respect, Twitter is a scholarly tool in which popularity becomes indistinguishable from professional evaluation. Since many scholars already use Twitter, as well as blogs and e-mail lists, in this way, it is fair to say that new forms of peer-review have already arrived. The AltMetrics movement aims to track those other forms of scholarly impact.

Jason ended his talk with a proposal to “decouple” the scholarly journal, to recognize that journals have traditionally performed several different functions — often identified as registration, certification, dissemination and archiving. Some of those functions are now trivial; why pay anyone for dissemination in an age when an article can be distributed to millions with the click of a mouse? Other functions, especially certification (peer-review) are changing dramatically. Jason suggested that peer-review should be a service which could be offered independently of how an article was to be disseminated. Scholarly societies especially are in a good position to provide peer-review as a service for which scholars and their institutions could pay when it was felt to be necessary, but in an age when so much peer-review is already happening outside the structure of journal publication, it is clear that not all scholarship will require that formal service. So in place of the rigid structure that we have now, Jason suggests, illustrates, and enables a more flexible, layered system of scholarly networks and services.

As should be obvious by now, I found Jason's talk for Open Access Week provocative and thought - provoking. I hope I have represented what he said fairly. I have tried to indicate where I am paraphrasing Jason directly, and he should not be blamed for the conclusions I draw from his comments. But for those who would like to hear from Jason directly, and I highly recommend it, he and several other leaders in the area of AltMetrics will take part in a webinar sponsored by NISO on November 14, which you can [read about and register for here](#). You can also find slides and a video from a [presentation similar to the one he gave at Duke here](#).

# A foray into politics

Tue, 20 Nov 2012 14:56:41, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]

This site has been quiet for about three weeks; for much of that time I was in South Africa, first as a tourist and then to attend the Berlin 10 Conference on Open Access that was held in early November at the University of Stellenbosch. I hope to write about the conference and the South African context in the near future. But today I could not resist a foray into politics.

On Friday, the U.S. House Republican Study Committee, which is described as a policy development group for the more right-wing Republican members of the House, issued a memo on copyright reform. I admit that I flipped out when I saw it; I have never been a one-issue voter, but [this memo](#) had the potential to turn me into one. As I will explain in a minute, it was, in my opinion, a home run explanation of what is wrong with copyright policy making in the US today and what solutions would look like. It suggested a radical rethinking for the Republican party about its approach to intellectual property law, one that is actually much more in step with other values that are supposed to motivate the GOP.

Alas, however, it was not to be. By Saturday afternoon the Executive Director of the Study Committee issued a memo withdrawing the document and apologizing for its release. His explanation was that it had not been properly “reviewed,” but the far more convincing explanation, [offered by Mike Masnick of TechDirt](#), was that the lobbyists for the recording and motion picture industries had gotten very busy very fast and threatened the GOP with the loss of lots and lots of campaign donations if the memo was not retracted.

There are two ironies in this story of *realpolitik* over reason. The first is that Derek Khanna, who wrote the memo, really got the analysis right. The other is that sticking to their guns on the topic might have been a very fruitful political strategy for the GOP as they seek ways to capture the hearts and minds of younger voters. The politics of the situation is nicely explained in [this article from Slate](#) (which has its own take on the politics, of course). But I would like to look at the substance of the memo for a minute.

Khanna’s memo is built around three “myths” about copyright that he debunks. The first is that copyright is primarily intended to compensate creators. The second is that copyright is all about free market competition. And his final myth is that the current copyright regime is the best way to foster innovation and productivity. To me, it is very obvious that the first and three of these are, indeed, myths. A quick glance at the clause authorizing Congress to pass copyright laws makes it clear that the purpose for those laws is the public good, and that compensation for authors is an instrumentality that is justified when, and only when, it helps serve that public purpose. And there are few people who are not employed as lobbyists for the content industries who would seriously maintain that our current regime is actually the best balance of protection and access to foster innovation. Take a look, for example, at this [blog post by federal Circuit Court Judge Richard Posner](#) for a concise explanation of how badly our current patent and copyright laws over-protect and therefore hamper productivity.

To me the real surprise was that this policy strategist even had to address the myth that says that “copyright is free market capitalism at work.” Copyright, of course, is a government-granted monopoly; the very antithesis of free-market capitalism, it is government protectionism. Indeed, one of the reasons that copyright has to be so carefully balanced is because it can so easily have anti-competitive effects, lending government support to favor one industry or type of business over others. This is why

our anti-trust laws have actually developed special rules to address claims of restraint of trade in industries that rely on the artificial monopoly conferred by IP laws.

For a political party that advocates free-markets and the reduction of government interference, copyright reform seems like a perfect platform, especially as it would appeal to younger, tech-savvy voters. It was refreshing to see that at least one policy strategist recognize that this was not just an important issue, but one that could capture the attention of the electorate. Unfortunately, the strength of the content-industry lobbyists appears to have won out, at least for now. But I am hopeful that the Republicans, and maybe even Democrats (although they have traditionally been even more dependent than the GOP on money from Hollywood) will continue to wake up to the fact that our current laws create an artificial thumb of the scale of markets in the US, putting the government in the position of supporting legacy content industries at the expense of new and innovative businesses.

# Two steps to a revolution in scholarly publishing — a thought experiment

*Fri, 30 Nov 2012 13:02:11, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

During the Berlin 10 conference on Open Access, the first instance of the Berlin Conference held in Africa, some of the most compelling speeches came from those who advocated a much more radical approach to breaking the hold over academic publishing currently exercised by commercial firms. Especially from Dr. Adam Habib, the Deputy Vice-Chancellor for Research from the University of Johannesburg, the delegates heard a call for immediate and direct action, even if it provoked a fight with commercial publishers. In his opinion, at least, that would be a fight worth having, particularly for an African university.

These calls for radical solutions got me thinking about which stakeholders had the power to break open the current structures, which were called feudal and iniquitous by one speaker, and what actions they might take. The result was the following thought experiment.

First, it seems to me that only two stakeholders really have both the will and the power to radically alter the terms and conditions of scholarly publishing. One set of stakeholders are the academic authors themselves, who seem to largely recognize that the current system is grossly unfair to them and does not serve the best interests of scholarship or of scholarly authors. Nevertheless, academic authors are limited in the kinds of action they can take, both because they are not well-organized and because of their dependence on the promotion and tenure system.

That leads to the other set of stakeholders who could shake up the system — the universities themselves. Are there steps they could take that would reset the conditions for scholarly publication? I think there are, and it seems like universities, if they were so minded, could create a revolution in scholarly communications with two simple, but by no means easy, policy changes.

First, universities could alter their intellectual property policies to assert that faculty scholarship is, in fact, work made for hire. The legal argument here is simple and persuasive, that faculty work is created by regular employees within the scope of their employment. Courts have recognized this argument for years, but universities have rightly been unwilling to press the case, for fear of doing harm to relations with their faculty members. But as the scholarly publication system increasingly fails to adapt to the radical new conditions created in the digital environment, it is possible to imagine a policy change like this undertaken with the cooperation of the faculty authors themselves.

To make this work, universities could assert ownership, under work for hire rules, and at the same time grant back to faculty authors a broad license to make customary scholarly uses of their own works. This would actually be a similar situation to the one that now obtains, where authors give copyright away to publishers without compensation and receive back fairly limited licenses to use the works they created. Universities would almost certainly prove better partners in this approach to intellectual property because they could extend much broader licenses to the original authors and because their values are much more congruent with those of academic authors in the first place.

If universities owned scholarly writings as work for hire, however, they would have control over the means of publication. They would have the power, and the incentive, to refuse to have work published

in commercial journals. They could give complete preference, if they wished, to open access journals and specifically to those open access journals that are run by scholarly societies and university presses. Almost overnight universities could put an end to the subscription model that worked so well for 300 years and has now become an obstacle to academic research and scholarly communications.

Of course, if universities were to cut out the commercial publishers, the second step in this revolution is obvious — the system of evaluation for academics, the standards for promotion and tenure review, would have to change. And this would also be a very good thing. The system we now have, dependent as it is on the impact factor of the journals in which articles are published and the reputations of the presses who publish books, is inefficient and under-inclusive. It assesses a work of scholarship on only one type of impact, citations in other scholarly journals, and evaluates that very limited metric at the journal level rather than article by article. Once we stop confusing what was the only thing we could measure, in the past, with what is truly important, we will see that in today's scholarly environment we actually can do much better.

So the second policy change that universities would need to undertake to affect this revolution would be to require that all assessments be based on article-level metrics applied to openly available works. This change sounds very radical, but some institutions are already moving towards it. At the University of Liege, in Belgium, it is already the case that faculty assessment is done only for articles that are in the university's open access repository; this was the way Liege decided to put teeth into their open access mandate. But universities could require open access and article-level evaluation measures while still supporting a variety of publication models.

And that is the final point to be made about this make-believe revolution. If universities carried it out, it would free up more money than it would cost. Once academic publication in commercial journals was halted, library collection budgets could be redirected. Instead of a long transition period during which costs would be expected to rise because both subscription models and open access based on article processing charges would have to be supported, which is what the Finch Report predicted in the U.K., this suggestion would allow for wholesale cancellation of commercial publications. The money saved would then be available to build up the infrastructure for repositories and to support APCs for gold open access publication. Authors would have a choice — they could publish in an OA journal or they could publish directly to the institution's repository. Peer review could be preserved in a distributed model; OA journals would continue to support traditional peer review, while some of the money saved from commercial subscriptions could be redirected to a more independent, discipline-specific system of peer-review. This would provide an important role for scholarly societies, and subventions provided to support such society-run peer-review would help protect those organizations from any negative consequences of this radical re-visioning of the publication system. Societies and non-profit presses, of course, could also find support through the publication of gold OA journals and even monographs. University funds from library collection budgets would be more distributed than they are now, able to be used more efficiently to support activities genuinely central to the academic mission, and they would, I believe, be more than adequate to the task.

So that is the thought experiment that began at the University of Stellenbosch while listening to calls for radical action. I don't know whether I think it would be a good idea to implement or not. But I believe it would be the fastest way to dramatically fix the current, broken, system of scholarly communications. There would be many obstacles to these two policy changes, and the medicine might be worse than the disease. But at the very least, thinking through this experiment in revolution has given me a better perspective on the power dynamics of the current system. In libraries we are accustomed to thinking that the huge commercial publishing firms hold all the power and that there is nothing we can do to



break their stranglehold over scholarship. But upon reflection we can see that the real power over the system, which can either perpetuate it or revolutionize it, really does reside on our own campuses.

# Another fair use victory for libraries

Mon, 26 Nov 2012 08:19:56, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use]

*Note to readers — a commenter has correctly pointed out that I was a bit over-enthusiastic in this post. It is not strictly true that no infringement has been found in any of the cases against libraries. In the Georgia State case the Judge did find five instances of infringement among the seventy-five digital excerpts that were challenged. But the Judge also held that the University's fair use policy was a good faith effort to comply with the law and, for the purpose of awarding costs and attorneys' fees, determined that GSU was "the prevailing party." GSU was simply ordered to revise its policy to reflect places where the Judge felt it had not adequately defined fair use. To be adequately cautious, however, my comments at the end of the first paragraph and of the full post should have said that fair use has been an effective tool for academic libraries that has been upheld in each case and has prevented any significant liability.*

We knew some time ago that the second complaint filed in the copyright infringement case brought against UCLA by the trade association AIME over streamed digital video had been dismissed. But last week Judge Consuelo Marshall [filed her order that explained the grounds of that dismissal](#). What we have learned is that this case is a slight victory for fair use in libraries. On the specific issue we do not have clear guidance, just an affirmation that fair use arguments for streamed digital video are not unreasonable or obviously wrong. But it is helpful to see this ruling as part of an overall picture, one in which all three cases claiming copyright infringement by academic libraries which were defended on the basis of fair use have now been decided at the trial court level and NO INFRINGEMENT HAS BEEN FOUND.

In the AIME v. UCLA case, the reasons for the dismissal are primarily that the plaintiffs lacked standing — the legal right to seek judicial redress of a claim — and that the defendants have either sovereign immunity or qualified immunity based on their status as state officials performing their jobs. A lot of the interest in the ruling is in the part that discusses qualified immunity, because that holding involved deciding whether or not a reasonable person in the position of the official charged would have known that his or her actions would be "clear violations of established copyright law."

As for the standing issue, the Court says pretty much the same thing I said at the time the second complaint was filed — the plaintiffs have not shown any facts that make this complaint different from their first one, which was dismissed earlier. These plaintiffs simply are not the right people to bring this case, and the folks who would be in a position to claim copyright infringement have not stepped forward to support the complaint. Perhaps those other parties understood the risk that there would be another positive ruling for fair use, and did not want to take the chance.

But as I say, the real action is on the issue of qualified immunity, where a plaintiff must prove, to overcome such immunity, that the defendants either knew or reasonably should have known that they were infringing copyright law. In the light of what the Judge calls the "ambiguity" of the fair use issue, she declines to so rule, and hence dismisses the complaint against these defendants (including library and IT staff) because of their qualified immunity.

Judge Marshall's fair use analysis is very cursory, but still quite interesting. On the first factor, the purpose of the use, the Judge simply states that it favors fair use, presumably because the use is educational and non-profit. This is no surprise. On the second factor, the Judge recognizes that the

works involved, performances of Shakespeare plays, are creative, but also that they are being used in an educational context. She finds this factor to be neutral. As to amount, Judge Marshall thinks this factor weights “slightly” against fair use — the entire films are being streamed, of course, but she finds “compelling” the argument that this streaming is analogous to the “time shifting” upheld by the Supreme Court as fair use in the *Sony* video recorder case. Finally, as to the impact on the market factor, the Judge says this factor FAVORS fair use because there is no difference in a streaming situation as to market harm than would be the case in the clearly permitted situation where a classroom full of students watched an entire movie together. The recognition of this essential similarity as to market harm strikes me as fundamentally important.

So the Judge holds that “there is, at a minimum, ambiguity as to... fair use.” In fact, her analysis would be very likely to uphold fair use, but she does not need to reach such a ruling in order to find in favor of qualified immunity and dismiss the complaint. Judge Marshall then goes on to examine the licensing terms under which UCLA obtained these videos, to see if those terms state unambiguously that streaming is not allowed. Here too she finds ambiguity, and thus upholds qualified immunity regarding that assertion as well.

Legally, the bottom line in this case is that all of the claims are dismissed with prejudice, which means that they cannot be refiled, although, of course, the dismissal could be appealed, if AIME and Ambrose Video are inclined to waste even more money.

For libraries, I think there are several takeaways from this case:

1. The fair use issue as to streamed digital video was not decided. This is not a blanket authorization for schools to proceed with such projects; they still require careful thought and a local decision that balances the risk of copyright litigation with the pedagogical value of proceeding.
2. It is very important to look at licenses for the videos in question, where they exist. It seems clear that an unambiguous license would have overcome qualified immunity in this case.
3. The grounds for this dismissal apply only to the state officials involved; the same analysis would not apply to a private institution, although the fair use analysis, of course, could be raised by such a college or university.
4. Overall, the atmosphere for fair use on campus is a lot better today than it was six months ago. We have seen a pretty convincing victory in the Georgia State e-reserves case, a sweeping one in the HathiTrust case, and a tepid affirmation of fair use (probably!) in this streamed video case. Although the first two of those cases are being appealed (we do not know if AIME will appeal this latest decision), we now know that courts are quite sympathetic to fair use by academic libraries and on college campuses. We know that most of the arguments that content providers have long offered to discourage reliance on fair use have been rejected. We know that no campus has yet been found guilty of infringement when it makes reasonable fair use of lawfully acquired materials for limited teaching purposes.

# Up the revolution?

*Mon, 10 Dec 2012 06:01:15, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

Since I posted my thought experiment about how to create a revolution in two not-so-easy steps, several colleagues have sent me responses and additional material, and it is clear that further discussion is called for. That is good news, as far as I am concerned. Talking about a revolution, in the scholarly communications space, is a lot more profitable than merely complaining about the status quo.

Several commentators have suggested that the first revolutionary step I proposed, asserting institutional ownership over faculty scholarship under the work for hire doctrine and then granting back to the authors broad reuse rights, would create an outcry and be impossible to implement due to “political” opposition. The latter point may well be true — that is why this is a thought experiment — but I am not sure that in reality the proposal would create a situation that is very different from the current state of affairs for scholarship. Most academic authors actually hold their copyrights for a very short time — they transfer them to publishers nearly as soon as a work is complete and often retain next to nothing in terms of rights to reuse. In practice, the situation I proposed would be more advantageous for authors, not less; authors would hold broader rights than they do now, and the copyright would be in the hands of an entity with a vested interest in seeing the reputation of the author — that specific author rather than merely a journal title — grow.

One colleague sent me a link to [an article about academic ownership of copyright](#) that is found on the AAUP website. The article strongly asserts the need for individual ownership of academic work and asserts a “parade of horrors” that would result if institutions asserted ownership over ANY faculty work (the specific work that it mostly focuses on is syllabi). My colleague suggested that it showed how strong opposition to such an assertion of institutional ownership would be. But as I read the article, I found that it made such a strange argument that I doubted its ability to represent mainstream opinion amongst academic authors.

Consider two of the horrible examples offered as to what might result if universities forced faculty members to make just their syllabuses openly accessible (something many institutions already do, with an eye toward assisting students in selecting classes to take). The authors of the AAUP article illustrated the alleged danger of having syllabi available to the public by citing a claim made by right-wing political activist Phyllis Schlafly in 2007 that allegedly blamed the mass shootings that took place on the Virginia Tech campus on a “feminist professor” from the killer’s major department whose syllabus, Schlafly said, illustrated how the “mixed-up kid” might have become further “confused.” Surely this is poor argumentation — we can hardly allow nutty assertions about what takes place in college classrooms to force us into “bunker” mode, where we hide from publicity lest someone, somewhere, calls us kookie eggheads or worse. In fact, being more public about the scholarship that is pursued on our campuses ought to have the effect of countering the frequent claims made by pundits and the media alleging academic bias, indoctrination or just plain wackiness.

Another attempt to tar open access and institutional ownership with the brush of controversy comes much later in the essay, when the authors express doubts that the University of Colorado would have wanted copyright ownership in Ward Churchill’s controversial “little Eichmanns” essay. The implication is that copyright ownership somehow would make Colorado even more responsible for Churchill’s views than they would already be considered, simply as his employer. But this is not true, of course. Many different industries, employing all kinds of authors, own copyright without being responsible for the

content of the writings they own. And a University is always going to be blamed or praised for the work of its faculty members, regardless of where the copyright in that work is held.

The real issue raised by this essay is academic freedom. If the University of Colorado was the copyright owner in Churchill's essay, could they have declined to allow it to be published, or even forced alterations? Would work for hire mean that universities would have control over the content of faculty scholarship, as well as its distribution?

The first answer to this very legitimate question is that it would depend on how the work for hire assertion was managed. The contractual relationship between a university and its faculty, for example, could not only grant broad reuse rights to the authors, it could also guarantee publication of faculty-authored publications in whatever venue the faculty member stipulated, as long as the venue met tenure or promotion requirements. Articles that were not to be considered in the promotion and tenure process would not qualify as work for hire because they would be outside the scope of the employment. A provision such as this would separate scholarship, in which the institution has a significant interest and for which it provides the principle incentive, from other kinds of writing.

The second answer to the worry over academic freedom is that the current system also poses threats to faculty independence and self-governance. For over a year now, the publication contracts that faculty authors sign with journals owned by Elsevier contain provisions that condition the rights that those authors retain over their work on the nature of the policies that the faculty on a particular campus have adopted. If your faculty policies meet with Elsevier's approval, you are granted a moderately generous reuse right. But if your campus policies are such that Elsevier disapproves of them, those rights are not granted. This intentional intrusion on the right of faculty to set policies for themselves that they believe are in their own best interest and the best interests of the academy has been met with surprisingly little outcry, perhaps because it is buried in the fine print of contracts most authors never read. But it is stark evidence that commercial interests can also pose a threat to academic freedom, especially in the digital age.

In any case, all of this concern over who owns scholarship may be unnecessary. Another commentator on my original post about two steps to revolution made the excellent point that the first step might not be necessary. If the goal is to cut out the commercial publishing interests that are making a mess of scholarly communications, that can be done simply by deciding that only articles (and books?) that are openly available and subject to article-level assessment techniques will be considered in the promotion and tenure process. No change in ownership is actually needed, and this one-step solution gets us around the (manageable, nevertheless) worry over academic freedom.

Is this one-step revolution possible? As I mentioned in the previous post, at least one university, in Liege, Belgium, has put this policy into practice. As [this translation of a memo](#) from Rector Bernard Rentier says, at Liege, starting October 1st, 2009 only those references introduced in ORBi [the institutional repository at Liege] will be taken into consideration as the official list of publications accompanying any curriculum vitae in all evaluation procedures 'in house' (designations, promotions, grant applications, etc.)

So it seems pretty clear that such a policy is possible and practical. But to be honest, it probably is very difficult to implement in a context where most open access opportunities exist only in the STEM disciplines. Faculty in the humanities, especially, are likely to feel disadvantaged by any such policy. One possible solution, of course, which is what Liege has adopted, is to make the institution's open access repository the focus of the policy, so that articles published anywhere can be considered for

promotion reviews as long as they are *also* in the repository. But open access, and its role in P&T, will be easier for many to accept when the options available for OA publication in the humanities begin to catch up with those in the STEM fields.

That is why the [announcement made by Amherst College](#) earlier this week of a digital, open access press being founded in the College library to focus on peer-reviewed monographs in the humanities is so exciting (there is also a [story about the project](#) from Inside Higher Ed here). Experiments that facilitate open access in the humanities are important as much psychologically as they are practically; they will help make more scholars more comfortable as they wean themselves from dependence on commercial publishers and “reader must pay” models. And they will demonstrate, I hope, that open access monographs are as viable as journals.

At the end of all this, I think I want to revise my two-step revolution. While I still think that the issue of copyright ownership deserves in-depth discussion, the two-steps that seem most important to me now are, second, that promotion and tenure processes limit themselves to consideration of openly accessible works, and, first and foremost, that colleges and universities follow the lead Amherst, “giving light to the world,” has provided by supporting new ways in which scholarship can be produced and disseminated.

# It seems simple, really

*Fri, 14 Dec 2012 07:34:08, ksmithl2@duke.edu, [category: uncategorized]*

I have to start by saying that I am not an economist, and I know just enough to understand that economic analysis is never simple or straightforward. And yet, when these two different news items came to my attention in a short time frame, the link between the two of them still seemed pretty obvious.

Yesterday, Reuters news service ran an article about a [rating of eleven countries based on their enforcement of intellectual property rights](#). The index was prepared at the behest of the U.S. Chamber of Commerce by a group called The Global Intellectual Property Center, and it ranks the U.S. at the top of the list in terms of strong IP protection (23.73 points on a scale from 0 — 25). But what is interesting is who scored lowest (out of the eleven countries that were ranked). The four “worst” countries for providing the strong IP protection important to the Chamber of Commerce were the four countries known as BRIC — Brazil, India, Russia and China.

So what else do we know about these four nations? In fact, why were they originally grouped together under the acronym BRIC? The answer is that the term was coined because these four countries were the fastest growing emerging economies, showing growth rates between 5 and 9 percent in their gross domestic products (compared with [US growth](#) averaging 3.2 over the past 65 years). The source of these averages for the BRIC nations is [this report from PriceWaterhouseCoopers](#), dated February 2012, which contains this conclusion: “We expect the BRIC economies to continue to drive world economic growth in 2012.”

So the four countries driving economic growth are also the four countries with the weakest IP protection regimes, amongst those 11 rated by the Chamber of Commerce report. Doesn’t the conclusion seem simple, that weaker IP enforcement is part of the picture for economic growth? We need to acknowledge that the growth of the BRIC countries is slowing, as reflected in [this news report](#) about the conclusions of the Goldman Sachs Group, which originally coined the acronym. But the very fact that the news report refers to the “BRIC decade” is significant; over an extended period all four BRIC economies have grown very fast, and all of them have done so without strong protection over intellectual property.

Correlations can be tricky things, but I think some modest conclusions are justified. First, obviously, ratcheting up IP protection is no guarantee of economic prosperity. As we will discuss further in a moment, it is very possible for nations, industries and even individual creators to thrive without relying on a strong government-created monopoly over the products of the human intellect. Second, I think it is also clear that there is a point where IP protections can be too rigorously enforced, to the extent that they impede economic progress. Indeed, it seems likely that the US, with its high score on the survey described above, has reached that point; at a [recent forum sponsored by Federal Trade Commission](#), Professor Collen Chien of Santa Clara University pointed out that for the first time in 2012, a majority of patent lawsuits were brought by so-called “patent trolls” — companies that do not invent or create anything but exist simply to buy up patents and then demand licensing fees from companies that are trying to create and invent. These licensing fees can reach the point where they are nothing more than a government-enforced tax on innovation. The situation developing in the US with patent “thickets” and patent trolling is a painful example of how broad grants and strict enforcement of IP rights can inhibit economic development.

If we move from the level of national economies to that of industries and creators, these two conclusions seem to hold up.

Consider the example of the Nigerian film industry, often referred to as Nollywood. The Nigerian film industry has boomed over the past two decades, largely by becoming one of the world's leading producers of digital video films. And they have done this in an environment that "has not historically had robust intellectual property enforcement." As this [research paper from the University of California, Irvine Law School](#) suggests, IP protection is, at least a double edged sword. Piracy can reduce revenues, but it also helps to create distribution channels and grow markets. So creative industries seeking to grow in the digital economy need to do more than try, futilely, to eradicate piracy, they need to seek ways to shape their markets and their marketing to exploit the audiences that it can create.

Indeed, a [recent book from Oxford University Press, called "The Knockoff Economy,"](#) describes how several major industries, including fashion and food, can not only thrive in the absence of IP protection but can turn the shadow industries that develop around "knockoffs" into part of an overall economic strategy. And the story of the US film industry, as told in [Hollywood's Copyright Wars](#), actually confirms the role of unauthorized copying in the growth of new industries and suggests a model for internal negotiations to control and benefit from such "piracy" that are more effective than rigorously enforced IP laws.

Finally, if we want a very current, individual example, we need look no further than the Korean pop star Psy, whose "Gangnam Style" video is now the most watched YouTube video in history and who [stands to make \\$8.1 million dollars from the fame that he has gained by not enforcing his copyright](#). Very few of us had probably heard of Psy before the Gangnam Style video became the subject of the many parodies and remakes that flooded YouTube, blogs, college campuses, etc. He took no action to prevent those "knock offs," as many artists and production companies would have done. Instead, his fame grew to the point where he could license his song and his image for commercial uses at levels he could only have dreamed of if he enforced his copyright rigorously. In short, he found a way to monetize "piracy."

So, slippery as such conclusions can be, I feel comfortable with these two assertions. First, creative people and creative industries can thrive without strong IP protections. In fact, if you are continually looking to the government to increase IP enforcement on your behalf, your industry is probably already in bad trouble. Second, it is perfectly possible to over-enforce IP rights to the point where creativity and economic growth are stifled. There is good evidence that the US has passed that point, and the example of the BRIC nations should suggest to us that we need to reverse our course.



# Is the CCC having an “Instagram” moment?

*Thu, 20 Dec 2012 14:28:26, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: libraries, category: licensing]*

As many readers will know, the past few weeks have seen a couple of controversies over end user license agreements (EULAs) and Internet services. In the library world, Yankee Book Peddler, an order fulfillment service, announced that they would introduce such an end user license whenever someone logged in to their ordering database. The license terms included indemnifications and submission to the law of New Hampshire. Both of these terms are impossible for most public institutions, and there was a lot of outcry. Eventually, YBP withdrew its plan to introduce the EULA. Then, earlier this week, there was a lot of controversy when Instagram announced that its new license would give it the right to sell photos uploaded by subscribers, even for commercial purposes like advertising. Again there was much consternation and an eventual repudiation of its earlier position from Instagram.

The use of EULAs for academic services instead of negotiating terms with each customer is especially problematic. For one thing, those licenses often contain terms that are unacceptable and, for public institutions, may be invalidated by state laws and regulations over purchasing by state entities. Worse, the EULAs are by definition required as a condition of use, meaning that the staff members who actually accept them are seldom the employees who actually have the authority to bind a university to a contract.

These considerations were in my mind when our e-reserves specialist informed this week about “new” licensing terms he had encountered when placing a request for a permission license with the Copyright Clearance Center. A two and a half page set of terms was suddenly appearing with each order confirmation, and they contained a lot of the same troubling assertions that we saw with the proposed, but never implemented, YBP license. Institutions indemnify CCC and agree to defend them against claims arising from any use outside the scope of the license. Institutions agree to the application of New York law and the jurisdiction of New York courts. Most distressing, each institution that uses the CCC agrees that that organization, which has been active in financing the legal case against Georgia State University, has the right to access and audit university records, which is not only a possible violation of our obligations under FERPA, but also seems like giving a potential adversary free pre-litigation discovery rights.

As with the proposed YBP license, several of the terms in this EULA are impossible for most public institutions, which usually cannot agree to indemnifications — because they could create an uncontrolled drain on taxpayer dollars — or submission to the laws and jurisdiction of another state. Even for private institutions, which are not forbidden by law from agreeing to such terms, the license contains things we would try to negotiate around if the CCC had engaged us at the enterprise level rather than simply imposing these terms for acceptance by employees not actually empowered to do so.

Since I first learned about these terms on Tuesday, it has become less clear to me that they are actually new. It turns out that our e-reserve employees have been clicking through an “accept the terms and conditions” box when they place orders with CCC for some time. It is likely that other campus employees, including administrative assistants for departments, have done the same thing. I simply do not know if these terms that suddenly appeared on the order confirmation are new, or just a more assertive way of making the older terms known. In asking around, I discovered that at least one state university encountered and objected to similar terms several years ago, and negotiated separately with the CCC to arrive at a different agreement that supersedes any terms agreed to at end-user level.

My immediate reaction to these terms is that many of us will want to have similar negotiations to supersede this EULA, and that all of the CCC's public customers will have to do so. These terms might simply be invalid as a matter of state law for some public institutions, and they could be objected to by many other CCC customers on the basis that the end-users who must click through the license simply lack the authority to commit their employers to those terms.

For the record, I do not yet know what my own institution's reaction will be; I have scheduled a conversation about the CCC terms with our Office of University Counsel. But it still seems important to share the information about this new manifestation, at least, of terms that may well be unfamiliar to those folks who are actually responsible for contracting and purchasing decisions at their institutions.

I would be interested to hear from institutions that have already attempted to negotiate directly with CCC to supersede these terms. I hope the comments to this post fill up with the news that others are way ahead of me and have acted to prevent the problems this license seems to cause.

Finally, I wonder what impact these licensing terms could have on a fair use argument, especially in light of the ruling by Judge Evans in the Georgia State case. In that ruling, the Judge held that the fourth fair use factor, impact on the market for the original, favored the publisher (and so weighed against fair use) IF a license for the digital excerpt (not simply a license for another format) was "readily available at a reasonable price" (pp. 72-81 of the opinion). My question is, could the licensing terms imposed by the CCC have an effect on whether or not the license is "readily available." If a public institution, including, possibly, Georgia State, is prevented by state law from accepting terms like the ones included in each permission transaction from the CCC, can that permission really be said to be readily available? How can something be readily available if it is conditioned upon acceptance of an agreement that the institution is not allowed to accept? And if such a license cannot really be considered readily available, how dramatically does that impact the fair use analysis, especially in those cases where a publisher will not accept permission requests except through the CCC?

As I say, we are still deciding what these licensing terms, whether they are brand new or of long-standing, mean for our business with the CCC. But it seems likely that for some institutions, at least, these terms make the use of that permission service an impossibility unless they negotiate a superseding agreement. And for many of the rest of us, this added roadblock will cause us to rethink where and when we can purchase licenses, and when we must rely on fair use simply because we have no other feasible alternative.

# The collision of copyright and e-science

*Mon, 21 Jan 2013 17:46:05, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: international-ip, category: technologies]*

Last week I was attending a meeting on campus that had nothing to do with e-science (which today refers to virtually all science, I suppose) when a very fortuitous event occurred. Professor Jerome Reichman of the Duke Law School handed me a copy of the April 2012 issue of the *Minnesota Law Review* (vol. 96, no. 4). That entire issue is an article written by Reichman and Professor Ruth Okediji of the University of Minnesota Law school called "[When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods in a Global State](#)." It is a long article at 118 pages, although, because of the structure and conventions of law review articles in general, it is a quicker read than one might expect. More importantly, however, it is a very rewarding excursion into the ways that copyright law around the world have developed and become an obstacle to scientific research, an even more "immediate and pervasive threat", the authors suggest, than the more attention-grabbing problem of patent thickets.

The purpose of this post is to summarize the article and commend it to those who want more. The growing interest in e-science on campuses makes this a timely topic; we need to understand the potential difficulties that copyright law can create for digital research and scientific communications. And I have to begin by saying how grateful I am to Jerry Reichman for making the effort to keep me current with the work he and Ruth Okediji are doing. They are superb scholars whose work could and should have a direct impact on how universities support research and advocate for laws that facilitate, or at least do not impede, that research. Their joint work has tackled scientific issues and IP before, so I am delighted they are turning their considerable intellects to copyright and science. Jerry is also a good friend and, as I now know thanks to my young cousin who had him as her Contract Law professor a couple of years ago, a fine teacher.

Reichman and Okediji begin their article with an historical examination of the "growing divide between copyright law and scientific research" that encompasses both the unique conditions in the U.S. and international obstacles to science that arise out of the complex of treaties and directives that are now in place. They demonstrate convincingly that the traditional balance that has facilitated scientific research for years has been subverted recently by a variety of factors. Among these unhappy developments are the trend toward ever more protectionist approaches to copyright, database protection rules in the EU and judge-made protection for facts and data in the U.S., the use of technological protection measures to lock up data that would otherwise be free for scientific reuse, and an overemphasis on the so-called three-step test from the Berne Convention, which is too often applied without any normative guidance.

In the course of this discussion, Reichman and Okediji make an interesting observation about limitations and exceptions to copyright in general, and fair use in particular. They note that the traditional European approach to exceptions focuses on specific, narrow exceptions that lack flexibility. There is little surprise in their conclusion that the EU needs the flexibility of fair use. But they are also critical of the "all or nothing" approach that fair use fosters, where a use is either forbidden as infringing, or, if found to be fair use, does not allow for any compensation of the rights holder. In some situations, they suggest, especially when the path to scientific progress leads through commercial users, a "take and pay" rule, similar to what is found in the EU three-step test, might be welcome.

The overall situation that Reichman and Okediji outline is most unpromising, as they suggest that the rights of scientific users are shrinking even in the area of print media, and have been virtually eliminated

for science conducted in the online environment. Again, the growing trend toward copyright or copyright-like protection over data is a large part of the problem.

In the area of e-science, Reichman and Okediji offer scientific research a Hobson's choice between ignoring laws that have become unmanageable and unreasonable, or foregoing research opportunities. The two paragraphs in which they lay out these unavoidable options are worth quoting in full:

If the relevant intellectual property laws were strictly enforced, and the scientific community continued to respect them, scarce public resources earmarked for basic research would be siphoned off to intermediaries from scientists seeking access to and use of their own published research result. In that event, the public pays twice for the same output, plus a surcharge for mushrooming transaction costs ... Less innovation, not more, is the predictable result over time.

Conversely, if intellectual property laws are ignored by researchers determined to carry on with their work irrespective of unreasonable legal constraints, automated knowledge discovery tools will become transformed into engines of massive infringement. It is hard to see how systematic disregard of intellectual property laws, coupled with growing contempt for the legislative process that fosters them, will benefit authors, artists and other creators in the long run, especially when those condemned to outlaw status are not free-riders on costly musical and cinematic productions, but publicly-funded scientific researchers in pursuit of greater knowledge and applications that benefit humanity as a whole.

This is a situation that cries out for reform, and it is clear from the above that reform must begin by distinguishing scientific and academic research from commercial productions. One-size fits all copyright laws are failing the scholarly community, and legislators and judges need to begin to treat scholarly works differently. Fortunately, Reichman and Okediji provide us with a detailed set of recommendations about what kind of reforms are needed.

One reform they suggest that judges could accomplish would be the aforementioned "take and pay" approach to some uses that might otherwise be defended, probably unsuccessfully, as fair use. The authors point out that Justice Souter suggested just such a possibility in a footnote to the Supreme Court's decision in *Campbell v. Acuff-Rose Music* (the "Pretty Woman" case) but no judges have, up till now, taken the hint. The discussion from Reichman and Okediji on this point alone justifies a close look at the article.

Many of the other reforms they suggest are grouped under the heading "What E-Science Really Needs from Any Legislative Reform." In that astonishing collection of suggestions, Reichman and Okediji include a tailor-made exemption for scientific research, rules allowing the breaking of technological locks more freely for research purposes, and limitations on the ability to override copyrights limitations and exceptions by using terms of use and other contractual arrangements. And one other that we should mention that is particularly relevant in the international context is an alignment between database protection rules and copyright exceptions. Not only should copyright exceptions be used to adjust database protection laws, say the authors, but these exceptions, both as they apply to copyright *per se* and to *sui generis* data protections, must be "preemptory, mandatory and immune from both contractual overrides and TPMs" (citing a report from the Max Planck Institute).

There is so much to digest in this article that I feel a little abashed trying to summarize it. But one thing is certain, I think. The attention that Reichman and Okediji shine on the conflict between copyright laws

and scientific progress is simultaneously profoundly welcome and deeply troubling. Welcome because we must look at the problem squarely and honestly, and troubling because we have such a long way to go to solve it.

# It has started already

*Fri, 25 Jan 2013 05:08:38, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: libraries]*

By now I hope most readers are familiar with the case of *John Wiley v. Supap Kirtsaeng*, which was argued before the Supreme Court last October. The case involves the doctrine of First Sale in the United States, which underlies library lending and also allows consumers to buy and sell used books, DVDs, etc. The Supreme Court is being asked to reconcile conflicting opinions from the lower Courts of Appeal about what kinds of copyrighted materials are subject to first sale — that is, can be lent or resold without the permission of the rights holder. Specifically, publisher Wiley has asked to Court to uphold the Second Circuit, which ruled that first sale only applied to copyrighted materials that were manufactured in the United States.

If you need more background on first sale and the *Kirtsaeng* case, check out this [page of fast facts](#) from the Library Copyright Alliance. I have also [written about the case](#) before, arguing that in the new environment created when the U.S joined international copyright treaties, interpreting first sale in light of outdated rules about where something is manufactured does not make sense. But right now I want to focus on a specific argument made by the publishers before the Court, in light of two experiences I have had in the past 24 hours.

The Library Copyright Alliance filed an excellent brief with the Supreme Court in this case, arguing that a ruling limiting first sale to works manufactured in the U.S. could have devastating effects on libraries. The Court seems to have spent a lot of time discussing this “parade of horrors,” and I hope that whatever decision is finally made by the Court, allowances are made to protect libraries. But the response from the publishers in regard to these putative threats was to simply assert that they would not happen. The law, they argued, already allows enough room for libraries to go about their business, and we publishers have no interest in disturbing the practices that have been in place for years.

These are comforting reassurances, suggesting that publishers, like most of the rest of the American population, likes libraries and wants to see them flourish. But can we really rest assured?

Yesterday one of our librarians came to me about a film we had bought. In response to a faculty request, we purchased a DVD of this film through an ordinary commercial channel. Going directly to a retail outlet in this case was the fastest way to fulfill the request, as librarians will surely understand. But somehow the film’s producer found out that our library owned a copy of this film, and they have been asserting to us that we need to buy an additional license, at three times the retail price we paid for the DVD, in order to lend the film. The argument is incorrect, of course. The copyright law allows us to lend any lawfully made copy that we acquire, without permission or a lending license. This is not the case in every country; some nations grant to the copyright holder a “public lending right” that forces libraries to pay extra fees. But no such right exists in the U.S., and first sale allows us to lend the DVD we bought. Also, there is no indication that the DVD was manufactured abroad, so even an adverse decision in *Kirtsaeng* would not change our situation.

Then this morning I had a conversation with a lawyer at another institution about an analogous situation. A donor to their library had given them some books, amongst which was a copy of a specialized textbook that is currently in use at the school. Subsequently, the library has been contacted by the publisher of the textbook who has told them that they are not permitted to place the copy of the book that they were given in their library. The reason given for this prohibition is apparently because

they do not want copies of the book lent, and because students might make photocopies rather than each buying their own copy. The publisher further told the school that they would never sell a copy of the textbook to a library.

Publishers are free to discriminate on prices of course, and even to refuse to sell to libraries. But to do so they have to lock down channels of acquisition. We bought our film from a retail website because, as I said, it was the quickest way to fill a faculty request. Obviously the site made no attempt to determine what “kind” of customer we were, and the producer had clearly decided to use this retail outlet. The text book at the school I spoke with was a donation. The answer to the rights holder trying to restrict lending in both cases is the same — tough luck. First sale covers these situations and allows libraries (and everyone else) to lend lawfully made materials without permission.

In light of *Kirtsaeng* it is important to note that in neither case is there any indication that the works in question were manufactured abroad. But if the Supreme Court does decide that only materials manufactured in the U.S. are “lawfully made” for purposes of first sale, I think two things are obvious, based on these two experiences and many others like them.

First, publishers are anxious for an excuse to charge libraries a differential price to obtain books that will be lent. They already do this with journals, so the claim that they do not want to do it for books is simply incredible. And even before a final decision in *Kirtsaeng*, some publishers are already trying to bully libraries into paying more. As long as retail channels are available to us and first sale protects lending, those efforts will fail. But if publishers cannot lock down and segregate their distribution channels, they may be able to undermine first sale.

That brings me to the second obvious thing. If the Supreme Court does hold that first sale applies only to copyrighted works made in the U.S., publishers will have a strong incentive to move their manufacturing operations off-shore. In making its ruling in *Kirtsaeng* the Second Circuit admitted as much. If a publisher has its books printed or its DVDs pressed in the U.S., it will be very difficult for it to implement truly tiered pricing. But if it moves those operations overseas, it might be able to stop libraries from lending materials without a separate, expensive license. It might also be able to forbid libraries from lending certain books entirely, like textbooks. It might even be able to stop students from selling their textbooks second-hand to the next crop of students taking the course. The experiences libraries have had with e-books proves that these goals are important to publishers. So do the two experiences outlined above.

In spite of assurances made to convince the Supreme Court to rule in its favor, this “parade of horrors” is really quite likely if first sale is restricted. Indeed, I am very sure these things will be attempted in that event. Such efforts have started already.

# Law and politics in the GSU case

*Mon, 04 Feb 2013 09:18:43, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: fair-use, category: libraries]*

Last week we saw the first real [flurry of activity reported](#) in the publisher appeal of the Georgia State University fair use victory. The news items and filings call our attention to both the legal and the political aspects of the appeal.

Starting with the law, over the weekend I gave the [publishers' Appellants Brief](#) a preliminary examination, and want to highlight four points from that brief that the library community needs to be aware of and to know how to refute.

The most fundamental part of the publishers' argument is the analogy between the practice of e-reserves at Georgia State and the cases that were decided in the 1990s regarding printed course packs. At trial, Judge Evans rejected this analogy for a good reason that the publishers largely ignore. They assert that the Judge impermissibly distinguished print from digital "course packs" and thereby violated the principle that copyright law requires "media neutrality." It is quite true that courts often tell us that copyright should be technologically neutral, although that is by no means a hard and fast rule — the fact that there is a special provision in the law itself regarding Digital Audio Tape proves that Congress itself is not really dedicated to "media neutrality."

But of course the real problem with this argument is that it entirely misses the point of the distinction Judge Evans drew. She simply did not decide to treat digital materials differently from print; she quite properly treated a non-commercial use differently from a commercial use in the fair use analysis. The publishers want to throw sand in the Appeals Court's eyes here by distracting them from the correct fair use analysis, which looks at specific circumstances. In this case, there was no commercial intermediary for the e-reserves, but there was for the course packs involved in the cases the publishers cite. Fundamental difference in facts equals different result on fair use, and no error on the part of the trial judge. Instead, a persistent and probably willful failure to understand basic fair use law on the part of publishers.

A second argument that is key to the publishers' brief is that only transformative uses can be fair use. Judge Evans specifically found that the e-reserves at GSU were not transformative, and that is a point that the Appeals Court should re-examine carefully. But even if that is affirmed on appeal, it does not rule out fair use. Again, a complete reading of Judge Evans' ruling shows that she got the fair use point exactly right — a use does not have to be transformative in order to be fair use.

When the Supreme Court re-calibrated the fair use analysis to focus on transformativeness in *Campbell v. Acuff-Rose Music*, they made this point explicitly, noting in a footnote that some uses could be fair without being transformative. The publishers acknowledge that Judge Evans cited this footnote, but go on to argue, incredibly, that there is no justification for this contention in the statute, even though they recognize that the statute gives as one of its paradigmatic examples of fair use "multiple copies for classroom use." They still argue that Judge Evans should have given great weight to the alleged non-transformativeness of the use, apparently feeling that Congress did not intend the plain sense of that language about multiple copies for classroom use, or that it somehow was only sanctioning transformative multiple copies for teaching (a contention that does not even make linguistic sense). It is absurd, but it shows how desperately hard it is to undermine the careful work Judge Evans did and how completely the publishers believe that the law is designed to serve their needs and only their needs.



Two other legal points before we turn to politics. First, the publishers insist strenuously on the 1000 word limit for classroom copying that comes from the 1976 Guidelines on that topic, and which Judge Evans rejected. They make no mention of the 10% standard from those guidelines, which the Judge did adopt, because the language of the Guidelines is “whichever is less.” It is precisely that language, of course, that makes the Guidelines “impractical and unnecessary,” as Judge Evans said, and why they were never agreed to by most higher education groups. Second, the plaintiff’s brief asserts that Judge Evans erred by approaching the analysis of market harm on a work-by-work basis. Instead she should have looked at the overall impact of these “digital Course packs” on publishers overall, and accepted, apparently, their analysis of market harm even though it was not borne out by the revenue figures they were forced to provide to her. This argument overlooks the best reason of all for evaluating market harm on a case-by-case basis, the fact that publishers and the Copyright Clearance Center do not make digital licenses available on a uniform basis. Each publisher takes a different approach and even within a publisher’s list there will be licensing differences for some works. Although the CCC is touted to the courts as a uniform licensing solution, libraries that use it, and even those few who use its blanket license, know that it is far from uniform. Since libraries must continue to do work-by-work analysis to obtain licenses, at vastly different prices and terms, and with uneven availability, the courts MUST look at fair use and market harm on a work-by-work basis.

Based on the weakness of the brief, I think the law still favors GSU. But politics is a different matter. Last week [we learned that the United States government has asked](#) for extra time to decide if it will intervene, and it has made clear that its intervention would either support the publishers or favor neither party. The one thing we know for sure is that the Obama administration has no intention of defending educational fair use. Why not? Probably because of the [revolving door](#) between the Copyright Office (and other administration advisers on IP) and industry. Most of the people who talk to the administration about IP policy have been either lawyers for the industry or lobbyists. Unfortunately, the educational community cannot view this administration, or most of its predecessors, for that matter, as impartial arbiters of fair policy on copyright matters.

It is still possible, and even likely, I think, that the Court of Appeals will largely uphold the lower court ruling on GSU. Judge Evans’ analysis was very careful, even fastidious, and there is not much room to knock it down. The publishers’ brief wants to win on “big picture” issues unique to its business model, but we can hope that the Court of Appeals will understand that this is not what fair use is about. But even if they do, we are still left with an unfortunate situation, in which so much scholarly work, work created for a social benefit and usually with costs underwritten by taxpayers, is turned over *gratis* into the hands of commercial entities. And those entities have proven that they will not shrink from fundamental attacks on teaching and research in order to squeeze every penny they can from that work, money that comes time and again from the public. This is iniquitous for the public and for the scholarly authors, it is reaping what one does not sow, and it turns the purpose of copyright law on its head. But it is also business as usual for the commercial scholarly publishing business.

Last fall I had extended conversations with two senior executives from two of the plaintiff publishers in the GSU case. I came away from those conversations convinced that both men genuinely saw themselves as providing a benefit for scholarship. I do not doubt their sincerity, although the one who told me he could “live with” a 10% standard for e-reserve fair use obviously had little input on this brief, which jettisons 10% for a maximum of 1000 words. But they are wedded to a business model that was once necessary for scholarship and simply is not any longer, and their denial of that fact, and desperate defense of the businesses they run (which is only to be expected) now poses a threat to the educational mission of colleges and universities. The copyright in most of these works is owned by our faculty

members, and it is well past time that we just refused to transfer those rights to commercial entities that undermine our best interests. Libraries and faculty senates must accelerate the pace at which they embrace new models — and non-profit older models — for the dissemination of scholarship. We know the change is coming, and actions such as those undertaken by these publishers as they continue to push the lawsuit against GSU, prove beyond doubt that we cannot wait much longer before scholars simply take their works and their rights out of commercial hands.

# What's up with Antigua?

Fri, 01 Mar 2013 07:48:40, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip]

*I wrote this post several weeks ago, intending to explain the oddities of international copyright treaties that led to Antigua being poised to become a “copyright haven” that does not recognize US copyrights. Many other events intervened, but I think it is still worth posting for the sake of the explanation, which some readers might find informative. As far as I know, nothing further has occurred, and I suspect that the two governments are negotiating, after the threat from Antigua got the attention of the US.*

The media and bloggers have feasted on the irony — little Caribbean island nation Antigua is going to [become a copyright haven](#), where works from the US film and music industry can be shared freely and without constraint from copyright laws. The US has [warned Antigua](#) not to do this, but the World Trade Organization has ruled that it is an acceptable sanction to impose on the U.S. for, of all things, not allowing Americans to gamble on Antigua's online casino sites. The whole thing, I think, requires some explanation.

The story really begins when the World Trade Organization (WTO) adopted an agreement, called TRIPs, for “Trade-Related Aspects of Intellectual Property Rights,” that made the Berne Convention binding on all members of the WTO. Prior to TRIPs, the international copyright agreement known as the Berne Convention obligated its signers to do certain things, but it did not really have any “teeth.” If nations ignored the obligations they undertook, there was little that the World Intellectual Property Organization, a U.N. body that administers Berne, could do about it. But when the copyright requirements were made part of the obligations of all members of the World Trade Organization as part of the 1994 General Agreement on Tariffs and Trade (GATT), they suddenly gained an enforcement mechanism. WTO members are allowed to retaliate against other WTO members that implement unfair trade practices, as defined by the GATT.

Trade sanctions usually involve the same goods and the same market — if country X refuses to buy cotton from country Y, country Y is entitled to impose a tariff on cotton from country X. But the WTO also allows so-called cross-retaliation, where a country can redress the wrong done to it in one market by suspending its obligations in another market.

In the Antigua/U.S. dispute, cross-retaliation has been approved by the WTO. The origin of the dispute is in the U.S. Unlawful Internet Gaming Enforcement Act from 2006, which made it illegal for off-shore gaming sites to take wagers from gamblers in the U.S. Antigua complained that this was an unfair trade restraint, and the WTO agreed, saying that Antigua was harmed to the tune of 21 million U.S. dollars. The ruling also affirmed the right of Antigua to take retaliatory steps against the U.S., including in different markets. Since intellectual property is now a market governed by the WTO through the TRIPs agreement, Antigua announced, and the WTO approved, that retaliation would take the form of suspending the recognition of U.S. IP rights in Antigua. This was an astute strategy on the part of Antigua, given how dedicated the U.S. administration is to appeasing the traditional entertainment industries. Thus it has become [possible, but not certain by any means, that free Internet movie and music sites would develop on the island](#), which could not really be called “pirate” sites because the failure to recognize US copyrights would be sanctioned by the WTO.

The irony of the situation is fodder to many commentators. This [column from a British paper](#) notes that the idea of allowing cross-retaliation in the first place came from the U.S. And [Mike Masnick from](#)

[TechDirt](#) suggests that the US entertainment industry has been “hoist by its own petard,” since one of the many means by which the so-called “copyright minimalists” have sought to ratchet up IP enforcement seems to be coming back to bite them.

For my part, I think the whole dispute illustrates what a mistake it is to treat intellectual property rules, and especially copyrights, as mere trade regulations. First and foremost, to do so ignores the underlying purpose to serve the public good that animates those rules in the U.S. and in many other nations. When these rights become pawns in the cross-retaliation games of international trade organizations, it becomes clear how complete the divorce is between copyright and its justification, which is to build an incentive for creators to create. And what seemed like a good idea to the major content industries, because treating copyright as a purely trade issue would provide greater enforcement opportunities, has turned out to be a very sharp two-edged sword.

In reality, copyrights very seldom serve their proper function as incentives for creation. Many creators are unaware of the vast period of protection their works will receive automatically and create for entirely other reasons. For the small fraction of copyright holders who do rely on copyrights to produce income, those rights are almost always transferred to intermediaries who exploit them primarily for their own benefit, so that the incentive function is curtailed. Witness how ardently the music and movie industry is fighting the “termination right” that was enacted in our copyright law to ensure that creators would have an ongoing opportunity to gain from their rights. Although support for individual authors has always been the battle cry of the publishing and entertainment industry, its role as an incentive has always been dubious. And when it becomes a chip in this poker game over trade — a bargaining position to defend online gambling, of all things — it is even more clear that concern over creativity has gone out the window. We will hear, of course, that what Antigua has threatened will be bad for artists, musicians and actors, but those folks will likely never feel any effects if Antigua becomes a “copyright haven.” Instead, this is a battle over trade policy that reveals just how cynical we have become over IP rights.

# A vexing question

*Fri, 08 Feb 2013 07:48:29, ksmithl2@duke.edu, [category: authors-rights, category: copyright-in-the-classroom, category: copyright-issues-and-legislation]*

I think it is time we talked about a difficult and sensitive issue. I have been asked the question over and over again during the past few years, and I recently saw it discussed on an electronic list. Should libraries stop buying materials from the publishers who are suing Georgia State University over electronic reserves? Numerous librarians have asked me since the case began if they could protect the environment for research and teaching by refusing to buy materials sold by Oxford University Press, Cambridge University Press and Sage Publishing. Another version of this question that I have also heard is whether or not libraries should try to avoid doing business with the Copyright Clearance Center, which is helping to finance the lawsuit, either by restricting e-reserves to portions within the trial court's definition of fair use or by insisting on dealing directly with the publisher of the work, not the CCC.

I say this is a difficult and sensitive issue because any attempt to organize a movement along these lines raises worries about violations of anti-trust laws. I have to say immediately that I am NOT an expert on anti-trust, and I frankly do not know where the boundaries lie. I do know that organized boycotts that attempt to force prices down are problematic; anti-trust law is very concerned to protect the role of the competitive market in pricing, so organized movements to reduce prices are quite likely, I believe, to be considered "combinations in restraint of trade." It is less clear to me what consumers can do when they object to a business practice of a company, rather than price. There have been apparently legal boycotts against retailers based on their labor relations practices; [this article](#), for instance, refers to a call for such a boycott by a former Clinton administration cabinet secretary, who apparently did not get into trouble. Where the line is between price boycotts, which I think are likely to be illegal, and permissible boycotts over business practices, I do not know.

But there is another, more fundamental reason why I do not think libraries can or should organize over this issue. Library buying decisions are mission-driven and must be made locally. For some schools, it may be possible to decide not to buy Oxford, Cambridge and Sage titles because of the lawsuit without compromising their mission to serve teaching and research on their campuses. Other schools would find that to be an intolerable burden on their ability to facilitate education. It depends on the needs of a campus and is probably a conversation that each library should have with its own community.

I want to emphasize this again. The reason we are so disturbed by this unprecedented attack on higher education from academic publishers is precisely because it threatens to undermine our core mission. It would be a mistake to undermine that mission ourselves just because we are so angry at those publishers. So this is what I tell librarians who ask me this question: If you believe you can refuse to buy from these publishers without harming your fundamental mission, or if you have the support of your faculty, then I think you have made a courageous decision that I admire. But if you are considering a unilateral decision without consultation with the teachers, students and researchers in your own community, then I think you have more work to do.

The conversations I am advocating here could have a different effect as well. After all, this deplorable lawsuit is not a "library problem," it is an academic problem; an issue that needs to be addressed by the higher education community. There were, remember, more faculty members called to testify at the trial in 2011 than there were librarians. And it is our faculty members who supply, for free, the content that these publishers publish and the reviewing work that assures its quality. To my knowledge there is nothing in the law that prevents faculty authors from deciding to publish in and review for different

publishers instead of those who are attacking basic scholarly practices. A large group of mathematicians and others made such a pledge some time ago to withhold their scholarship and their labor from publishing giant Elsevier, a move that garnered a great deal of publicity to their complaints and made a real difference on the public policy front. I would be delighted to see librarians and faculty authors on campuses across the US have a similar conversation about how decisions about where to publish or review get made, and whether some decisions are better for the overall scholarly environment than others.

# The view from the other side of the revolving door

Wed, 13 Feb 2013 07:02:22, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

*PREFACE — On Friday morning I wrote two blog posts. One, about whether libraries should stop buying materials from the publishers that are suing Georgia State, I [posted right away](#). The other, about the amicus brief filed in that case by two former Registrars of Copyright, I saved and intended to post today. But yesterday I discovered that [Mike Masnick at TechDirt had posted his own wonderful column on the same subject](#). I never mind being “scooped” because these are important issues and more discussion is always better than less. But in this case I realized that Mike had said quite well everything I had planned to say. I decided to post my comments anyway in hopes of reaching an even broader audience, but interested readers should follow the link to Mike’s post first. What follows below is only for comparison or for the entertainment of the truly dedicated.*

In an [earlier post](#) about the Georgia State University e-reserves case, I mentioned the unfortunate revolving door that seems to exist between the Copyright Office and other executive-branch IP advisers and the entertainment industries. Many officials who advise the government on copyright policy are [former executives or lawyers for big media](#), which results, inevitably, in a very one-sided view of the issues.

A recent [“friend of the court” brief](#) filed in the GSU case has provided a very relevant and troubling look at what the world looks like on the other side of that revolving door. It was filed by two former Registrars of Copyright, Mary Beth Peters and Ralph Oman, in support of the publishers who are suing Georgia State, arguing that the judge in the trial court was pretty thoroughly wrong in her analysis, which found that a large majority of the excerpts challenged as potential copyright infringement were, in fact, fair use.

There is really very little in the argument made in the brief that need detain us for long. Its principal contention is that Congress never intended fair use to be used to give broad support to non-commercial educational uses. Basically, they say the court erred by giving too much weight to the non-commercial educational nature of the use that the publishers are challenging. To make this unconvincing argument, they resort to lots of arguments that concede that the law appears to say something, then assert that its apparent meaning is not really what was meant at all. They resort to legislative history to show that Congress rejected the idea of a specific exception for educational use, which is quite true, and try to claim, from that fact, that fair use cannot be seen as a broadly-inclusive exception for education. Of course, the opposite argument is more plausible, that Congress rejected the specific exception precisely because they thought fair use was the better way to accomplish the same purpose. And legislative history, as any law student knows, is only useful in statutory interpretation when the plain language of the law is ambiguous. Since five of the six paradigmatic purposes in section 107 are educational functions, including “multiple copies for classroom use,” and since the section specifically mentions “non-profit educational use” as a key to the first factor analysis, the language seems pretty unambiguous. So the desperate resort to a twisted view of the legislative history would seem to be unavailing. Likewise when they argue the the Supreme Court, in the *Campbell* case, required that only transformative uses be considered fair; they acknowledge that the Court explicitly said that the most obvious exception to this analysis was those “multiple copies for classroom use,” but try to argue that the Court really did not mean it.

The goal of these contortions is to assert that the only proper analogies for the GSU case are the “course pack” cases that ruled that commercial intermediaries must pay licensing fees when they make course packs at the request of faculty members and sell those course packs to students. The two former registrars want to argue, implausibly, that the distinction between that situation and a wholly non-commercial situation where there is no profit being made, no charge to students, and no commercial intermediary is irrelevant.

What is most interesting about the brief, however, is that the two former registrars, when they make the required “statement of interest” telling the court why they are approaching it to render an opinion on the issue, do not see fit to mention that one of them is a current [board member of the Copyright Clearance Center](#), and the other a former member of that same board. The CCC, of course, is helping to fund the lawsuit and is probably the single entity that has the most to gain, financially, if the Appeals Court reversed the lower court’s decision. Presumably because the CCC is not actually a party to the case, Peters and Oman are not required, I imagine, to disclose their relationship with it. They do reveal, in a section called “Corporate Disclosure Statement,” that the costs of preparing the brief were underwritten by major publishers like Elsevier and John Wiley, but nowhere do they state that they have or have had compensated positions (I presume) on the CCC board.

This is precisely the revolving door that troubles me, and the skewed perspective represented by this brief confirms my worst fears, that the public interest gets lost in the back and forth employment between industry and the Copyright Office.



# GSU and Sony

Thu, 14 Feb 2013 08:45:30, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries, category: scholarly-publishing]

Another day, another silly brief filed in support of the plaintiff publishers in the Georgia State copyright infringement appeal. [This one](#) comes from the American Association of University Presses (AAUP). I wish it were not the case, but I am past being shocked that university presses are so anxious to support a lawsuit against universities, and one that, if successful, would significantly increase costs for students and/or diminish the funds available to buy materials from university presses. The short-sighted thirst for more dollars from university budgets and an overall blindness to the big-picture best interests of higher education has long been the fundamental characteristic of this lawsuit.

Many of the arguments in the AAUP brief are familiar from the other briefs. It should not matter that the copying complained of was non-commercial and for educational purposes. The course pack cases (which all involved commercial intermediaries who made the copies and sold the course packs) are perfect analogies to the present situation in spite of the factual differences. The judge also erred, apparently, by inquiring into the factual character of each challenged use of an excerpt instead of recognizing that the publishers just don't like fair use, except when they benefit from it, so factual inquiries are irrelevant. All of this we have heard before, and I am tired of writing about it.

But while reading this brief, and the [press release](#) the AAUP issued about it, it struck me that there are things we can learn about this case by making comparisons to the famous Supreme Court case of *Sony v. Universal Pictures*, in which the Court decided that consumers making temporary copies of television broadcasts on the "new" video recording devices then being marketed was fair use (and therefore did not find Sony guilty of contributory infringement for marketing the devices). One argument in particular made by the AAUP reminded me of *Sony* and the lesson we should learn from it.

We have frequently heard the complaint that the judge missed the forest for the trees in the GSU case. That is, she focused too much on the specific excerpts that were being challenged and failed to appreciate the scope of the harm that the overall practice of e-reserves would allegedly do to publishers. In the AAUP brief, this argument appears as an objection to the way Judge Evans analyzed market harm, the fourth fair use factor. The complaint is that she looked at figures for permission income for each book in question, which she found to be "negligible" in most cases, and did not look more broadly at the overall importance of permission income generally to university presses. In their press release the AAUP calls Judge Evans' analysis "niggling."

So now let's consider *Sony*. In that case, the plaintiffs were faced with a much more massive threat of unauthorized copying. Entire works were being copied, rather than just 10% or a single chapter of each work. And the potential market harm was even greater, since the TV and movie studios were afraid that their advertising revenues would drop sharply if millions of Americans began taping their favorite shows rather than watching them when the executives and their advertisers expected them to. Surely fair use could not sanction such a massive and pervasive threat. And yet it did. The Court did not even do the level of financial analysis that Judge Evans did in the GSU case. Justice Stevens, in *Sony*, simply considered the overall situation — individual consumers who used the VCR to "time-shift" for more convenient viewing — and, finding it was fair use, dismissed wholesale the concern for the alleged market harm that would occur if each of those individual consumers each exercised this fair use right. If Judge Evans was niggling in her assessment of market harm, the Supreme Court was downright uninterested in *Sony*.

What we learn from this analysis is that fair use represents a boundary on the rights held by a copyright owner. Market harm is a factor to consider, but when a use is clearly fair use — as these uses of 10% or less of a work were found to be, even in some instances where the Judge felt that market harm factor counted against the fair use argument — the assertion that one could still have squeezed some more money out of those uses will not be heard. After all, I could make some money by charging pedestrians to walk on the sidewalk that crosses my residential property, but society has simply decided that I will not be allowed to do that; the easement for a public right of way that allows sidewalks functions as a boundary, of a sort, on my property right. And in any case, the assertion that a license fee might have been earned, even when the rights holder is not in fact collecting such a fee or depending on it, could always be used to undermine fair use; many courts have recognized this circularity and refused to let it be determinative of fair use questions.

The confusion that reigns when one is swept away in this whirlpool of circularity is nicely illustrated by this howler for the AAUP brief:

Further, one of the key reasons that permissions income is low is that some universities have failed to pay required permissions fees for their electronic coursepacks. Publishers should certainly not be penalized because of the universities' failure to pay them the permissions to which they are entitled by law.

Neat, isn't it? The small amount of permission income that we actually get, and its consequent minor impact on our business, should not be considered in the fair use analysis because it would be higher if it weren't for this pesky fair use thing. We could make more money without fair use, and therefore that money should be taken into account when deciding whether or not something is fair use. A truly bizarre argument that is only possible when one fails to recognize that all property rights, including rights over intellectual property, have to have boundaries.

As these briefs have been filed, and the weakness of the plaintiffs' arguments on appeal have been revealed, I have gained new respect for the careful and thorough nature of Judge Evans' original decision. I do not entirely agree with her on every point, but she did her job very well. The appeal, it seems to me, is looking more and more desperate.

That reflection leads me to end this post on a different, but related, topic. In a recent article about a meeting of the the Professional and Scholarly Publishing Division of the Association of American Publishers, Blaise Simqu, who is President and CEO of Sage Publishing, one of the GSU plaintiffs, is quoted as saying this in a speech:

Publishers are, for the first time, having to care about the end user, and that's a huge cultural shift

Libraries represent and serve a significant portion of Sage's end users, and the statement that publishers would like to know more about us is good news. It often feels like publishers think of libraries as massive infringement factories, full of irresponsible pirates who are just waiting for a chance to digitize everything and give it away for free on the Internet. In fact, it is usually the library on a college or university campus that is teaching and advocating for responsible copyright practices. And our digitization decisions are made very carefully, partly out of respect for copyright and partly because the process of digitization and online access is costly. I think we would like very much to sit down with Mr. Simqu (I have actually had that pleasure) and his counterparts to talk about how we see our mission and

why we take the positions about copyright that we do. But there is a huge obstacle in the way of such frank and open discussions, in the shape of the ongoing lawsuit against Georgia State. If Mr Simqu now realizes that he needs to care about libraries, a great first step would be to drop this appeal.

# Another view on GSU and anti-trust

*Wed, 20 Feb 2013 07:19:02, ksmithl2@duke.edu, [category: uncategorized]*

I seldom write a post that is just a link to someone else's work, but I am afraid that non-specialists, especially in the U.S., may not regularly read the blog of Canadian law professor Ariel Katz. And [this post about the GSU case](#) deserves widespread attention. Katz does a wonderful job of pointing us to the real motive in the lawsuit — to force colleges and universities to purchase licenses with the Copyright Clearance Center. This, he suggests, is an alternative to each publisher raising its own prices even further than they already have, and he sees in such an attempt a form of collusion amongst publishers to forcibly fix prices at a level higher than the competitive market, left to its own devices without judicial intervention, would bear. Katz's conclusion is that the Department of Justice, which suggested that it might intervene in the case on the side of the publishers, should really intervene on the side of the defendant in order to prevent what Katz argues is an illegal attempt to fix prices. He neatly compares the CCC to the so-called "patent pools" which were dismantled years ago using anti-trust laws, and to the DoJ's own recent efforts to prevent price-fixing in the eBook market. For consistency, he argues, the DoJ should pursue the same path against the efforts that publishers are making in the GSU lawsuit.

# Good government in action, and inaction

*Mon, 25 Feb 2013 05:22:37, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Governments are funny things. No matter where we fall on the “more government, less government” political spectrum, it is inevitably the case that sometimes we applauded government actions, and sometime we prefer government inaction. Last week, however, the scholarly communications community got the opportunity to admire BOTH positive action taken by the Administration and a positive decision in favor of inaction.

Let’s start with the inaction. On Friday, attorneys for the Department of Justice sent a letter to the 11th Circuit Court of Appeals, where the Georgia State copyright decision is being appealed, informing the Court that the DoJ would not be filing an amicus brief in that appeal. Recall please that the appeal is brought by the three publishers who lost pretty comprehensively in the trial court, and the DoJ had asked the 11th Circuit for an extension of time to file a “friend of the court” brief that would either support the publishers or support neither party. That generated a lot of consternation in the higher education community, and many calls for the DoJ to rethink its position. Apparently the outcry had an effect, and the Justice Department decided that it should not take sides in this dispute. It is even possible that the plaintiff publishers themselves realized that a brief supporting them from the DoJ would open up [cans of worms](#) best left closed and mobilize even greater opposition to their efforts to squeeze more money from college and university budgets. They may have asked the DoJ to stay on the sidelines. But that is pure speculation.

What is clear is that the folks at Justice decided that their original idea to get involved was a bad one. Because of the way a litigation schedule works, however, it is not too late for the DoJ to file a brief on the other side — supporting the careful analysis that the trial court judge did on the issue of fair use. But that is unlikely, I fear. Now, however, is the time for the higher education community to mobilize its own passion for its mission, and its own lawyers, to file on behalf of the defendant/appellee — Georgia State.

Then there is the action that was announced on Friday, and it could hardly have been better. The White House, after a long delay, [issued a directive](#) that instructs all federal agencies that have large research and development budgets to develop plans to make the articles that arise from such research funding publicly available within 12 months of publication. In short, the White House has recognized the success of the NIH public access mandate and has committed to providing the same benefit to taxpayers for the other research efforts that they fund. Additionally, the new directive also instructs agencies to examine data access and sharing, so it genuinely is seeking to improve the overall environment for research, and to give taxpayers a greater return on their investments.

Many readers of this blog responded to our appeal for signatures on the We the People petition that was begun last year on the White House web site. Those signers will all have received a [letter from the Office of Science and Technology Policy](#), which explicitly portrays the new directive as a response to the opinions put forward in that petition. So congratulate yourselves, maybe even buy yourselves a drink, in celebration of the good work you did on behalf of making scientific research faster, more nimble and more widely usable.

There is lots of press coverage on this directive from the White House. Check out these stories from [Science](#), the [Wall Street Journal](#), and the [Washington Post](#) for more details. But here is a detail that you

won't find in any news coverage, because it is not yet decided. What repositories will be used for public access to non-NIH funded research? Unlike the NIH, most agencies do not already have repositories that can become the mandated site for deposit. And it would be a travesty, as well as a sure way to undermine compliance, if open access were left for authors to arrange with their publishers, who will want to add new fees, which would inevitably be borne, eventually, by those same taxpayers. The sensible alternative is to tell authors that they can use open access repositories at their home institutions or at other educational institutions. Agencies might also specify some standards for reliability and access that could apply to acceptable institutional repositories. This will facilitate access at a lower cost. But it will also increase the urgency for institutions to develop or improve their repositories, since those IRs will very quickly become a vital service to assist faculty authors in complying with the broader mandates that are now so clearly on the way.

The White House directive might lead some people to assume that the [FASTR Act](#), which was introduced in both houses of Congress a couple of weeks ago, is no longer necessary. That would be a mistake. FASTR, which stands for Fair Access to Science and Technology Research and is the latest version of the bill formerly known as FRPAA, will do some things that the directive will not, or, at least, may not. FASTR, for example, directs each agency to investigate issues of reuse; although it does not mandate open licensing, it certainly sets genuine open access — including not just the right to read but also to reuse — as the ideal. Also, an act of Congress is more difficult to reverse, whereas an executive order can be countermanded by a subsequent president. So there is good reason to continue to urge our representatives in Congress to support the FASTR act. We can celebrate a very good week last week while still recognizing that we have more work, both in turning away the attack on fair use in academia and in supporting open access, ahead of us.

# Why is copyright different?

*Mon, 04 Mar 2013 07:07:58, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: orphan-works]*

One of the most basic justifications for all forms of property rights, something every first-year law student is taught, is that these rights encourage the efficient use of property. Because property (usually) is a scarce resource, exclusive ownership rights help encourage people who value and will use the property. For the same reason, restraints on the ability to sell property are generally discouraged — we support the “free alienability” of property so that those who do not wish to fully exploit a piece of property will be able to transfer that land (as it usually is) to someone who will. In short, the rules around real property exist because of the foundational belief that fields should be tilled and planted, and houses should be lived in.

In this context of why we have property rights at all, it is very easy to see and understand that the problem in copyright of so-called orphan works is a fundamental failure of the rights system itself.

In addition to rules that encourage property owners to sell that they do not intend to use, nearly all forms of property rights regimes also have doctrines that will take the property away from an owner who declines to exploit what he or she owns. The classic doctrine that does this is adverse possession, which can actually transfer title to a piece of land from the owner to a person whose only claim is that he is using the property while the owner is not. In North Carolina, for example, a person who openly possesses and uses a piece of land that is not her own for a period of at least fifteen years can ask the courts to transfer title to her. That is, owners of real property can lose their ownership simply because they did not use the property.

Real property is not the only property rights regime that has such a doctrine. Ownership over personal property can also be lost, through the doctrine of abandonment. If I leave my bicycle in a local park for long enough, without any indication of my claim to it or my intention to ever use it again, I may have abandoned the bicycle and it could become the property of another person who finds it, claims it and uses it. Although we do not usually think about it this way, property rights are a “use it or lose it” legal regime.

Perhaps someone will suggest that these use it or lose it rules make sense in the realm of tangible property, where scarcity is really a problem, but would be inappropriate for intangible, intellectual property. But that distinction does not work, because two other intellectual property regimes, trademark and patent, also have “use it or lose it” rules. A trademark owner can lose their rights in a mark through neglect — one must defend the ability of the mark to identify specific goods or services, or else the mark will be lost because it is not serving the purpose for which trademarks are granted. And patent rights can likewise be lost, if the rights holder does not pay the regular maintenance fees that are required.

In fact, as far as I can tell, the only form of property interest that cannot be lost even if it is never used is copyright. Unlike with land, chattels, trademarks, or patents, a copyright holder can hold on to their rights for nearly a century without using them at all, and still without losing them. And it is this bizarre feature of copyright, which distinguishes it from all other forms of property rights, that creates the problem of orphan works.

Of course, our copyright law used to have the same kind of mechanism that exists in other property regimes; renewal of copyright served as a very simple way to indicate a continued intention to use the property right, and without renewal the right was lost. With that renewal requirement, copyright stayed on a par with other forms of property. But we removed that requirement when we joined the Berne Convention, which forbids “formalities.” That probably made very little sense (and we have ignored other requirements of the Berne Convention in spite of our adherence to it in 1988) because it created the orphan works problem and undermined one of the most basic justifications — efficiency through use — for allowing exclusive property rights in the first place.

The best solution to the orphan works problem would simply be to reinstate the renewal requirement. That could probably be done without violating our obligations under Berne, if the requirement was imposed only on rights holders who are U.S. citizens. That would be only a partial solution, of course, but it would be better than the current situation and would address the oddity that copyright is a more ironclad right, at this point, than any other form of property rights.

There are also more “gentle” ways to address this problem. Given the current situation, where we give copyright holders a grip on those rights that is stronger than any other form of property, it would be possible, and eminently fair, to ask them to voluntarily take a simple step to make their intention to continue using their property known to others. A registry, or perhaps different registries for different genres of copyrighted works, would allow rights holders to assert their continued interest in their rights, and make it much easier for potential users of the work to find and contact the appropriate rights holder if they are seeking permission for their use. This would be a very non-intrusive way to address the problem of orphan works, especially in the context where other forms of neglect of property can result in forfeiture.

If a registry regime were voluntary and did not carry the threat of forfeiture that exists in other property regimes, what kind of “teeth” could be built into a registration system? The most sensible approach would be for judges, when considering a fair use claim over a piece of copyrighted work, to take into consideration the “find-ability” of the right holder. If the rights holder has taken any positive steps to be known and locatable, a claim of fair use should have to meet the same threshold that is currently erected for such defenses. But if the rights holder has done nothing, has “sat on their rights,” to use a old-fashioned phrase that is amazingly applicable to the current copyright system, then it should be much easier to establish fair use.

When Congress considered an orphan works solution a few years ago, it wanted to put the onus on users to search for the rights holder. But when we put copyright in the proper context of other property rights regimes, it should be obvious that these obligations should be a two-way street. All other property rights require some kind of indication that the rights holder will use the rights, or else they can lose them. In copyright, it would be fair, and a very small burden, to require a similar gesture — inexpensive and easy — of continued interest on the part of the rights holder. This is especially true if the only consequence of failing to make that gesture would be easier use, rather than a loss of the rights. Copyright would still not be on a par with other property rights in terms of encouraging, indeed demanding, efficient use of the property, but the balance would be redressed a little.



# International First Sale is upheld

Tue, 19 Mar 2013 09:41:06, ksmithl2@duke.edu, [category: uncategorized]

The decision in the *Kirtsaeng v. Wiley* case was released this morning, and the outcome is wonderful for libraries. I have not had the chance to read the whole opinion yet, but the upshot is that the Second Circuit rule that said that First Sale applied only to materials manufactured in the United States was reversed. The Supreme Court majority appears to have ruled that First Sale applies to all non-pirated goods — that is, all works that are originally manufacture under authority of the rights holder in a way that would entitle them to protection under U.S. law. In other words, if the work can be protected by copyright in the U.S., it is also subject to the rule in the U.S. that allows library lending and second-hand sales.

The [opinion is here](#).

It appears that the Court took very seriously that “parade of horrors” that were suggested if they upheld the Second Circuit — libraries would be unable to lend some materials without a license from publishers., student could be prevented from buying or selling second-hand textbooks, etc. According to the Court, these were too distressing, and too likely to occur. Furthermore, the Court held that a “non-geographical” reading of the language of First Sale in section 109 of the Copyright Act is a more sensible construal of the words that are actually used.

It seems that libraries have really ducked a bullet here. Business as usual is the way forward, for which we must be grateful to the Supreme Court. We probably should also be prepared to see this issue come before Congress, so we will likely again be called upon to defend the value of what we do and the need to have the law, at least, not step in the way of that very important work.

# The quest for “super-property”

Wed, 20 Mar 2013 10:55:23, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: libraries, category: scholarly-publishing]

Before yesterday’s ruling in the *Kirtsaeng v. John Wiley & Sons* Supreme Court case, I had written a post about the oddity that copyright law is the only form of property right that does not include a specific mechanism by which the rights holder can lose their rights if they do not use the property for a long period of time. In this way copyright violates one of the principal reasons that property rights are granted, to encourage the efficient use of resources.

In thinking about the *Kirtsaeng* case — the decision is [here](#), there is a [Chronicle of Higher Education story about the ruling here](#), and Kenny Crews of Columbia offers a [detailed analysis of the decision here](#) — I have come to realize that the same issue of whether or not copyright should behave like other forms of property was in play in this litigation. In short, by trying to enforce a “geographical” reading of the doctrine of first sale, publishers were attempting to create a “super” property right that would give them a level of control that other property owners do not get.

On a trip to Turkey two years ago, I purchased a silver and onyx ring while in Cappadocia, where onyx is mined in large quantity. My wife and I also purchased a carpet for our dining room. Both items could have been purchased in the U.S., but both were less expensive in Kaymakli than they would have been had we done our shopping in Raleigh.

I mention this small shopping spree to make two points. First, the sale of these goods at lower prices in other countries than are available in the U.S. does not, apparently, make it impossible for U.S. merchants to sell at higher prices to shoppers here at home. Price discrimination, as it is called when vendors adjust their price structure to take account of local market conditions, does not depend, apparently, on an absolute prohibition on importation or cross-border sales. Second, now that we own the ring and the carpet, we are free to do with them what we like. No one can tell us where to place the carpet, or to what events I may or may not wear my ring. And we can resell either item if we wish.

What publishers wanted from the Supreme Court was an unprecedented level of control that no other property owner gets — the right to control the *use* of a copy that was manufactured in another country (i.e. whether or not it could be lent) and to control any resale of that copy.

Let’s think back for a minute to the *Costco v. Omega* case from a few years ago that also dealt with unauthorized importation of copyrighted goods.

First, it is interesting that that case involved copyright at all, since the goods in question were watches, which are not copyrightable subject matter. Omega was able to bring the suit only by registering a small emblem on the back of the watches for U.S. copyright protection. They had to do this, of course, because simply being the owner of a batch of watches would not have given them control over the importation of legally purchased watches to the U.S. They resorted to this ploy to take advantage of the unique feature of copyright that they believed gave them more control than “mere” property ownership did. They were trying to exploit the “super” property features of copyright.

Second, even though Omega got a tie from the Supreme Court that left in place a favorable decision for them from the Ninth Circuit, they were ultimately unable to take advantage of that quasi-victory. On remand, the District Court granted summary judgment to Costco because, it held, Omega was trying to

misuse its copyright to prevent perfectly legal importation. In spite of that ruling (which is under appeal), I am pretty confident that Omega still sells watches for less in South America than it does in North America. Again, an absolute ban on importation is not a prerequisite to price discrimination; while there is always some “leakage” of “grey market” goods, price discrimination works well enough that all kinds of businesses that sell different types of property depend on it anyway.

So the outraged threats that are being heard from publishers about how U.S. market prices will now have to be charged for copies sold in the developing world are simply ridiculous. One extremely vocal advocate for the publishing position puts the claim this way, in a comment to the *Chronicle* story linked above:

The only practical effect of the decision will be to stop the practice of publishers licensing the sale of U.S. works for sale in foreign countries in cheaper editions, thus greatly inhibiting the flow of knowledge to underdeveloped countries.

If academic publishers were really to do this, it would be a crime against their self-declared mission of making knowledge available. It would also be bad business; a self-defeating fit of pique that would cost them a lot of money. But no, I am confident that publishers will still sell books at prices adjusted for market conditions, unless they are even worse businesspeople than I think they are. Perhaps it will be necessary to adjust prices to account for that leakage which the Supreme Court has said cannot be choked off entirely, but I actually suspect that that small loss is already built in to decisions about pricing.

One way to think about what was being considered in the *Kirtsaeng* case is to look at it as a tariff — an attempt to guarantee extra, post-sale income from goods when they were imported into the United States by forcing purchasers to license certain uses of those goods they had already bought. The U.S. disfavors tariffs, and where they do exist the money is paid to the government, which is trying to protect specific domestic industries. If *Kirtsaeng* had gone the other way, however, there would have been, in effect, a tariff on importing books and films that would have been an entirely private benefit. From this perspective, as from that of property rights as a general notion, what was being sought by the publishers in *Kirtsaeng* was unprecedented, as well as unwise.

[By the way, Mike Masnick of TechDirt also uses this [analogy with tariffs in one of his comments on the case](#), and his post is an indication that the publishers are already beginning to pull strings to try and get Congress to give them the extraordinary benefit that the Supreme Court has just denied them.]

One argument that the publishers have made and continue to make is that the “parade of horrors” that was predicted by libraries and many others in the Court would not have actually come about; they frequently say that what they were asking for was actually the state of the law for the past thirty years, and things have run pretty smoothly up till now. But to make that claim is to beg the question of why the case had to be brought at all. Libraries did not sue over first sale; neither did Supap Kirtsaeng. It was publishers who decided that they needed to go to court because, obviously, they wanted to change the conditions that actually have been in place up till now. Publishers were seeking a “new deal,” a super-property right that is unprecedented in any other market place. And what libraries “won” (remembering that no library was a party to the case) was simply the right to proceed as we have been for many years. I have no doubt that if the lower courts had been upheld in this case, publishers would begin to demand “public lending fees” from libraries whenever a book was printed in another country, and would have moved operations offshore to increase the situations in which they could demand such a fee (as the Second Circuit Court of Appeals acknowledged was a likely outcome). It is an

overstatement to call this a victory for libraries; it was merely a successful defense of what we have done for many years, which, it turns out, is something that our courts really value and appreciate.

# We're not done with First Sale

Tue, 02 Apr 2013 11:04:30, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]

In the Supreme Court's *Kirtsaeng v. John Wiley* decision, libraries caught a big break. But it was really no more than an affirmation of the status quo — libraries can still lend materials manufactured in other countries, students can still resell their textbooks regardless of where they were printed, and consumers and stores can sell second-hand books, CDs and DVDs. The “break” for libraries is in the danger we avoided, but the legal result is that the doctrine of first sale was NOT radically reordered to suit the demands of publishers for a [“super property” right](#). Nevertheless, the effort by the content industries to secure ever-greater control over secondary markets is continuing, and last week a decision about first sale as it applies — or, more accurately, does not apply — in the digital environment has supported that unprecedented level of control.

The case involves the digital music re-sale service ReDigi, through which subscribers can sell their digital music files through a complex process that is designed to ensure that the original owner absolutely cannot keep or access a copy of the music file once it has transferred to another subscriber who has purchased it. From the trial court's description of the process, it is very clear that ReDigi was trying to comply with a reasonable interpretation of the doctrine of first sale for the digital age. Most of their system was intended to enforce a [“forward and delete”](#) version of first sale that would seem to embody the spirit of what that doctrine is trying to accomplish. Unfortunately, Judge Richard Sullivan of the Southern District of New York found that ReDigi had moved too far beyond an obsessively close reading of the letter of the law.

[Judge Sullivan's order](#) is a close analysis of the wording of the doctrine of first sale, found in section 109 of the Copyright Act (Title 17 of the U.S. Code) and a very “physical” understanding of the digital world. The question he is addressing is “whether a digital music file, lawfully made and purchased, may be resold by its owner through ReDigi under the first sale doctrine.” The judge answers that question with a resounding no. His decision is based first, on the conclusion that the reproduction right in copyright is implicated whenever the copyrighted work is embodied in a new “material object” and that *each movement of a digital file from one server location to another is a new material object*. “It is simply impossible,” Judge Sullivan writes, “that the same ‘material object’ can be transferred over the Internet.” Since each movement from server to server, or from one segment of a server to another, is a reproduction, the Judge holds that the files sold over ReDigi are unlawful reproductions. First sale, furthermore, cannot apply to such copies. He is very explicit about this: “it is therefore impossible for the user to sell her ‘particular’ phonorecord on ReDigi... the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce.” There is no first sale — none at all — on the Internet, even without licensing restrictions on transfers.

The Judge does address very briefly the argument that this attempt to impose the analysis from the analog world onto the digital environment would have damaging implications for all kinds of consumer digital products, since reproductions are made all the time in ordinary computer maintenance activities and when content is moved from one device to another. But he dismisses that concern as a “red herring” because “other doctrines or defenses” protect such activities “almost certainly.” But he does not say which doctrines or defenses, and the fact that he has to resort to this vague reliance on the idea that the obvious negative outcomes from his decision will not come to pass shows that the decision is problematic from a policy perspective.

Indeed, it seems to me that Judge Sullivan is legally correct in his analysis, and thereby demonstrates that legal accuracy is not sufficient for this rapidly changing technological environment. I think even he recognizes that the ruling he is obligated to make is not satisfactory; in regard to the policy implications of what he is doing, he falls back on that old judicial claim that he is not allowed to legislate from the bench, and that Congress must fix the problem he is creating.

Congress should take up Judge Sullivan's invitation. It seems clear, in light of *Kirtsaeng*, that Congress will be asked to modify first sale this term. They should resist the publisher's pressure to "fix" the Supreme Court's sensible decision to leave consumers in no worse position than they have been in since 1908, but they can still readjust first sale to make it work for consumer sales of digital materials on the Internet. They should consider Justice Kagan's suggestion, in her concurrence in *Kirtsaeng*, that Congress fix the result from the *Quality King* case that read first sale as a limitation on the importation restrictions in section 602 of the Copyright Act. And they should recognize that the principle of "you bought it, you own it" is foundational to commerce, and in the absence of a negotiated agreement to the contrary, it should apply to the digital world. So Congress has a chance to look at the very reasonable business model that ReDigi put in place and find ways to authorize it under a modified doctrine of first sale. Unfortunately such reform, if it were to happen, would come too late for ReDigi and its customers.

# The O in MOOC

*Thu, 11 Apr 2013 09:14:54, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies]*

I am generally a poor speller, but even I understand that there are two Os in MOOC. So for added clarity, let me state up front that this post will focus on the first O — the one that stands for “open.” But I want to get to the discussion about that O in a slightly round about (pun intended) way.

Let’s start with an [insightful article from the recent issue of \*Nature\*](#) that contained several pieces about open access. The one that caught my attention is “Open Access: The true cost of science publishing.” The author, Richard Van Noorden, provides a wealth of detail, and a very even-handed analysis, about the varying cost of publishing an academic article. He is hampered, unfortunately, by on-going secrecy on the topic. Neither *Nature*, which is publishing the article, nor PLoS would not talk with him about actual costs. Nevertheless, there is a great deal of information here, and it all points to the conclusion that logic alone would have suggested — open access publishing, especially by non-profit entities, is much the more efficient way to disseminate scholarship.

One thing Van Noorden is able to show very clearly is that almost all open access publication charges are lower than the average per-article revenue that traditional publishers earn. The difference can be as much as between a \$300 cost per OA article and the average \$5000 revenue per toll-access one. The difference can be accounted for in one of two ways — large corporate profit margins or inefficient publishing methods. Whichever is the case, however, it is clear the open access is the better option. These lower costs are among the many reasons that open access provides a much greater benefit to academia than the traditional, pre-Internet system can.

In spite of this documented good news about OA, however, the article ends on a discouraging note, or perhaps it is better to say a note of frustration. Open access is obviously growing every year, but it is not growing as quickly, except where it is mandated, as it’s obvious superiority would suggest. So at the end, the article leaves us to speculate on the incentives faculty authors have for choosing, or not choosing, OA.

And that brings me back to the “open” in Massively Open Online Courses. The growing popularity of MOOCs, and their potential, parallel to that of open access itself, to revolutionize higher education, is a new and powerful incentive for scholarly authors to rethink access to their publications.

The fundamental driver behind the growth of MOOCs is the desire to expand the scope of our educational mission and to reach a global community of students we could not otherwise serve. Seen in that light, the “open” in MOOC is key. Part of our commitment as institutions participating in MOOCs is to try very hard not to erect financial barriers to participation in these courses. We resist the normal urge to require textbook purchase, for example. Our instructors are encouraged to recommend but not require books for purchase (with the result, BTW, that sales for the merely-recommended books nearly always skyrocket). But this commitment to keeping the courses open for students also means that we look for an increasing amount of open content for teaching.

When our instructors want to provide readings for students taking a MOOC, we generally pursue one of two options. Either we negotiate with publishers, who are slowly figuring out the marketing advantage they gain by allowing small excerpts of books and textbooks to be made available freely, or we look for OA content. Unfortunately, the negotiation option is slow and labor-intensive; often we must explain

the purpose and the conditions over and over again, to ever-shifting groups of officials, before we can get a decision. So open access is ever more important, because more efficient, for our MOOC instructors and their students.

One story will illustrate this growing interest in open access. A faculty member who was recently preparing to teach his first MOOC wanted his students to be able to read several of his own articles. When we asked his publisher for permission on his behalf, it was denied. A rude awakening for our professor, but also an opportunity to talk about open access. As it turned out, all of the articles were published in journals that allowed the author to deposit his final manuscripts, and this author had them all. So we uploaded those post-prints, and he had persistent, no-cost links to provide to the 80,000 students who were registered for his course. An eye-opener for the author, a missed opportunity for the publisher, and a small triumph for our OA repository. Enough of a triumph that this professor has begun asking colleagues if they could deposit post-prints of their own articles in the repositories at their institutions so that he can use those for his MOOC students as well.

So when we are counting up incentives for open access publishing, whether Gold or Green, let's remember that the massive opportunity that is represented by MOOCs is also a new reason to embrace open access.



# What I learned getting published by Taylor & Francis.

*Tue, 23 Apr 2013 07:28:24, ksmith12@duke.edu, [category: authors-rights, category: notes, category: scholarly-publishing]*

It was a rather embarrassing moment. I was in a meeting with other copyright specialists from academic libraries when I received the email telling me that [my article with Taylor & Francis](#) had been published. Before I could stop myself, I expressed my surprise out loud, then had to explain to my colleagues that I had just had an article published in a library science journal published by Taylor & Francis, and that I was not expecting it. Two sources of embarrassment here. First, especially following the [resignation of the entire editorial board](#) of a different library-related T&F journal due to their archaic authors' rights policies, this is not a publisher with whom I would have chosen to do business or encouraged authors who consulted me to use. Second, the fact that I was surprised by this news showed that I had been much more lax in my own decisions about publishing than I advise other academic authors to be. It is always awkward to be caught in a "do as I say and not as I do" situation, and especially so when you have to explain it to a respected set of colleagues.

So let me explain how this happened and what lessons can be gleaned from my experience.

The story began when I gave a talk at the 2012 conference of NASIG, the North American Serials Interest Group. Let me say at the start that no one at or representing NASIG did anything wrong in this encounter and that whatever misunderstanding or lack of information existed was entirely my fault. NASIG provided me with an interesting and engaged audience of librarians, which was all I could ask. In any case, I signed an agreement, as a "Vision" speaker (kind of ironic), allowing my talk to be mechanically recorded and also agreeing that a human "recorder" would write up what I said for an article for *The Serials Librarian*. In due time, that reporter sent me a copy of the article and I agreed that it was a good representation of the talk I had given, ready to be published. Not until the article was published did I realize that *The Serials Librarian* was a Taylor & Francis journal, and to the best of my recollection I never signed a copyright transfer agreement with T & F. At least, I can find in my saved e-mail the agreement to publish in *The Serials Librarian* but not a CTA.

Again, neither NASIG nor the article author did anything wrong; they sought and obtained all the necessary authorizations from me. It may well also be the case that the recorder who wrote up the article signed a CTA with Taylor & Francis, which she would have been entirely entitled to do. But as I say, to the best of my knowledge I did not, and the lessons I take from this incident are premised on that recollection.

So the first lesson is obvious — be careful what you sign. More careful than I was. I should have determined who the publisher was and made an intentional decision before I signed that agreement about what would be done with the article that resulted from my talk. It is quite likely that I would have agreed even after that small bit of research, since the article was actually written by someone else (as, I suppose, a derivative work from my original talk), and I had no further plans to use it in any way. What I often tell authors is to consider the agreement they are presented with in light of their own plans and hopes for their work, and transfer or license rights in a way consistent with those plans. If the agreements allow one to meet those goals, well and good; if they do not, negotiation is called for. The decision should rest with the author. In the experience I had, I did not make that decision in an informed way, and that, rather than the ultimate result, was the problem.

The second lesson from this experience is that authors choose journals, not publishers. When I read over the agreement with NASIG, *The Serials Librarian* seemed like a proper venue for the article resulting from my talk, and I failed to inquire further. Although I should have done, I did not look into the publisher's identity because for me at that moment, as for many academic authors, it simply didn't matter. The first step in getting academic authors to pay attention to the rights they transfer or retain is helping them realize that not all publishers are alike in this matter, and that they do need some awareness of who is who.

Next, my little story provides an opportunity to remind readers about the issue of joint authorship. Joint authors are very common, of course, in academia. Once mostly found in the STM fields, digital humanities projects are now making joint authors out of folks from many different departments. Joint authorship arises, of course, whenever two or more people each contribute original expression with the intent of creating a unified work. In the case of my talk, my original expression was fixed in the PowerPoint slides and notes that I had made. Recorder Susan Davis then created a derivative work from that original, adding a great deal of her own original expression. Once I had indicated my assent to that process, she and I became joint authors. Like all joint authors, we each hold an equal and undivided share in the copyright, and are each entitled to exercise the exclusive rights granted by copyright, subject only to a duty to account to each other for any profits (which I don't expect, in this case). Because of this situation, if Susan signed a copyright transfer agreement for publication of the article, she was perfectly entitled to do so. And because of the potential that fact has to create misunderstandings and surprises for other joint authors, it illustrates how important it is in general that joint authors agree in advance, whenever possible, about how their shared work will be used, licensed and made public.

Finally there is this point — if I am correct that I never signed a copyright transfer, and assuming, for the sake of illustration, that Susan did, then Taylor and Francis and I are now joint holders of the copyright in this article. One thing that means is that I can continue to exercise all the rights as a copyright owner — I could post the article to the web if I wanted to, for example — without consent from T & F. So when publishers tell us that they need to be the exclusive holder of copyright in every item that they publish, it is important to realize that that may be an aspiration, but it is not a necessity. In fact, my experience is only one of a large number of scenarios under which publishers routinely publish articles for which they are not the exclusive rights holders. As we seek to reform the scholarly publishing system, partly by encouraging academic authors to pay better attention than I did in regard to this article, this fact is an important piece of information to remember.

# Meet me at the intersection

*Mon, 29 Apr 2013 07:26:11, ksmithl2@duke.edu, [category: libraries, category: scholarly-publishing, category: technologies, category: uncategorized]*

In March the ACRL published a new White Paper on [Intersections of Scholarly Communication and Information Literacy: Creating Strategic Collaborations for a Changing Academic Environment](#) which looks at the ways in which the dramatic changes taking place in the environment for scholarly communication have necessary consequences for nearly all librarians, and especially those who teach information literacy to graduate and undergraduate students. As the current Chair of the ACRL's Committee on Research and the Scholarly Environment, I had a small role in preparing the White Paper (most of the heavy lifting was done by Barbara DeFelice of Dartmouth, who chaired an ad hoc working group), and so was asked to take part in a program about the document and the issue at the ACRL Conference earlier this month. On the morning of that program, I found in my email a link that led me into a fascinating story about exactly why this intersection can be so tricky to navigate, which I decided I would share here as well as at the panel discussion.

Coincidentally, the story involves a Duke professor, Dr. Mark Goodacre of Duke Divinity School, who is an active and engaging blogger on the general topic of the New Testament and early Christian literature. Several years ago, Mark wrote a blog post outlining a possible approach to a long-standing problem in the interpretation of one of the non-canonical gospels, the Gospel of Peter. By Mark's own admission it was a casual piece of writing, as many academic blogs are (he calls it "random jottings," but that is probably excessively modest). Recently, however, an entirely non-casual peer-reviewed article critiquing Mark's blog post has been published in a highly-regarded journal in the field.

Mark tells his own story, and links to the relevant documents, in [this later blog post](#). He also raises some interesting questions about the etiquette of the situation, which are discussed at length in the comments to the post. The entire discussion is worth reading, but I want to make a specific comment about how it relates to those intersections of scholarly communications and information literacy.

One of the things that information literacy librarians spend a lot of time teaching about is the set of "signals" by which the scholarly authority of a particular work is measured. Everything from the presence of footnotes to a notation that the article has been peer-reviewed can help students determine where on the continuum of authority a particular work they discover belongs. Also, students learn from librarians and others how to "backtrack" from one article to find those conversation partners whose combined contributions help form a complete and coherent view of any particular issue.

Both of these basic skills are undermined, to some extent, by situations such as the one Mark recounts. For one thing, it is perfectly possible that he could remove or revise his original blog post. Now Mark is a scholar and a very astute blogger, so I would expect him to acknowledge and explain any subsequent changes he might make to that post. But the possibility certainly exists, for this set of writings or for others, that the scholarly works under discussion could change or even disappear. That possibility presents those who teach about research skills a new challenge — to explain and help students account for the potential impermanence of the scholarly record. And even if they remain intact and unchanged, the challenge of helping students understand that a peer-reviewed work might be based on one that was never peer-reviewed, and consider what impact that possibility would have on their judgments about authority, persists.

I offer this anecdote as concrete evidence that the changing system of scholarly communications compels all librarians, and especially those who teach information literacy, to remain aware of what we might call the “socioeconomic” structure of information. That is, the conditions — social, economic, legal and technological — under which different forms and types of information are created and disseminated. We are witnessing, I believe, a radical disaggregation of scholarship, as new formats, new business models and diverse levels of accessibility become the norm for some disciplines and for many scholars. Even in a humanities field like Early Christian Literature, which still preserves many of its traditional modes of communication, this splintering of once solid lines has its effect. And for our students, whose entire information-seeking lives will be lived in an environment where technology, copyright and licenses control what they can find and what they can do with what they find, education on these matters is no longer optional.

It is precisely these changes, and the ever-more-pressing need to take them into account, that the ACRL White Paper is intended to document and encourage. It deserves attention from the library community precisely because we cannot ignore the revolution in scholarly communications itself.

# Fair use for appropriation art

*Tue, 30 Apr 2013 07:09:29, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: user-generated-content]*

A new ruling came out last week in one of the most interesting cases involving appropriation art, the ongoing dispute between photographer Patrick Cariou and appropriation artist Richard Prince. I wrote about the [unfortunate decision from the district court back in 2011](#), and on Thursday the Second Circuit Court of Appeals reversed that decision, determined the 25 of the 30 challenged artworks were fair use, and remanded the case back to the District Court for a better decision on the remaining five.

The [decision from the Appeals Court](#) tells the story of this dispute very clearly, but just to summarize, let me remind readers that Patrick Cariou took a series of photographs of Rastafarians that were published in a book, now out-of-print, called “Yes, Rasta.” Richard Prince then made a series of appropriation art works, which included collages of the photos as well as various other alterations. The trial court in the case decided on a summary judgment motion that these art works by Prince were copyright infringement. Judge Deborah Batts, whose opinions we have had cause to regret in the past, held that a fair use defense for the appropriation art failed because the new work must “comment on, relate to the historical context of or critically refer back to the originals.” When asked what his point was in these artworks, Prince told the trial court that he did not have a point, and that was very damning in Judge Batts’ eyes; for her, his works could be transformative only insofar as they were making a comment about Cariou’s work.

In Thursday’s decision, the Appeals Court told us, and Judge Batts, that this was not the right standard for assessing transformation for the purposes of fair use.

By the way, in her original injunction, which was vacated by the Appeals Court, Judge Batts had given Cariou the right to destroy Prince’s allegedly infringing works. I wrote about this with some outrage two years ago, so it is worth noting that, to their credit, Cariou’s counsel told that Appeals Court early on that they opposed destruction of the art, even though they wanted it to be held to be infringing.

The Second Circuit begins its opinion by pointing out, in clear and forceful language, that copyright is not intended to give authors or other creators “absolute ownership” in their works, as if by natural right. Instead, the Court notes, copyright is designed to stimulate creativity and progress in arts and sciences. This is not new, but placed as it is in the opinion, it strongly reinforces the point that fair use is part of the structure of copyright, not an oddity or a mere exception for extraordinary situations. Without fair use, copyright fails in its Constitutional purpose.

As for the correct standard for deciding if a work has a transformative purpose, the Second Circuit wants a broader rule than that articulated by the trial judge. Transformation can exist even without direct comment on the original, whenever the original work is altered with “new expression, meaning, or message” (quoting the Supreme Court in the *Campbell* case). The new work can be transformative if it “superseded the object of the original creation” by offering “new information, new aesthetics, new insights and understandings.”

Significantly, and especially important given Prince’s refusal to assign a “point” to his work, the court wants us to look at transformation from the perspective of the viewer, not the creator:

Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so. Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may "reasonably be perceived" in order to assess their transformative nature.

For me personally this is very reassuring. One of the ways I frequently tell students, faculty and librarians to try to decide if a proposed use is transformative is to advise them to ask themselves three questions. First, will the "quotation" of the original help me make my point? Second, will it help my reader/viewer get the point? Finally, did I use no more than necessary to make my point? These questions, by the way, are borrowed from LA attorney Dean Cheley, thanks to a [panel we were both on](#) at the 2012 ALA Annual conference. The part of the decision that reinforces these questions is the reference to what will help readers and viewers perceive the new message or new aesthetic. And while my "clients" usually do have a point to make, it is encouraging to see that fair use supports even appropriation art for its own sake.

Finally, the Second Circuit is very careful in its discussion of potential markets when assessing a transformative fair use. It is not enough, the Court says, that argue the new work could have been licensed, and thus assert that any fair use harms that hypothetical market for a license. Instead, the Court reminds us that the question is whether the alleged infringer has "usurped" a market in which the target audience and the nature of the content is the same as for the original. Where the audience for the new work is different, and there is nothing to suggest that the original rights holder would have thought to exploit that different audience or communicate the new message, aesthetic or insight to them, the entirely speculative possibility of a license will not undermine fair use.

In the end, the Appeals Court finds that 25 of the challenged art works are fair use. It remands only five of them back to the District Court for a new decision applying the correct standard. The chances are good, I would think, that this will never actually get back to the trial court, because some settlement, based on a licensing fee in regard to those five, is probably in everyone's best interest. But regardless of what happens about those five art works, we now have a very strong decision about transformative fair use for appropriation art out of the Second Circuit. Although not all fair uses, as we know, have to be transformative, this kind of decision helps lend support to many of the most creative forms that teaching and learning take on our campuses.

# Finding out who your friends are

Tue, 07 May 2013 15:03:26, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]

The period for filing *amicus curiae* (“friend of the court”) briefs in the appellate phase of the Georgia State University copyright and fair use case has closed, so it is a good time to take stock of who has weighed in on each side, and what their arguments look like. Even though this will be a long post, it is still only a very sketchy summary of all of the arguments being made.

I have already written about [some of the arguments](#) made in support of the publishers who brought the original lawsuit and are pursuing this appeal after having lost in the district court. Notably, we have discussed the [strange argument made](#), essentially on behalf of the Copyright Clearance Center, which is helping to organize and finance this quixotic lawsuit, by two former Registrars of Copyright that fair use was never intended to favor non-profit educational uses. We also noted the decision by the U.S. Justice Department [NOT to get involved](#) on behalf of the publishers.

When the briefs supporting the publishers are examined, the striking fact, to me, is that no one supports their position who does not stand to gain direct financial benefit if it is upheld. No one is arguing that giving more money to the intermediaries who are such a drain on college and university budgets is a good idea in itself, or would be a benefit for scholarship. The supporting groups like the American Association of University Presses (whose participation on this side is especially tragic), the Authors Guild and the “Copyright Alliance” are all looking to line their own pockets by supporting a reversal of the trial court. Not surprising really, nor an evil intent in the abstract, but something that is well beyond the purpose and intent of the copyright law. This is prospecting for gold on the part of the publishers, and they are trying to do it on public property.

I was interested to see that one of the parties on the *amicus* brief filed by the Author’s Guild was a group called the “Text and Academic Authors Association,” of which I had never heard. Was this really a group of academic authors opposed to fair use on campus? Well, only sort of. The [website](#) of this oddly named group (all authors write text; I think they mean “textbook”) shows that the majority of their leadership council is made up of non-academics or retired professors, who presumably no longer need to rely on fair use for good teaching. And the strange perspective of the group can best be judged by [this article](#) arguing that textbook prices are justified and are not too high to interfere with quality education, a perspective thoroughly debunked by nearly every study as well as by day-to-day experiences on campus. Indeed, the only sensible way to read the article is to recognize that every “myth” it undertakes to refute represents a demonstrable fact. More on this shortly.

So now let’s look at the friends of GSU and some of the arguments they are making. In addition to the brief filed by GSU itself, there are at least five *amici* groups — The [Library Copyright Alliance filed a brief](#) on behalf of the ALA, the ACRL, and the ARL, and was [joined in that brief by the Electronic Frontier Foundation](#). There was a joint brief from the American Council on Education, the Association of American Universities and three other higher education groups, one by the American Association of University Professors, and another from an independent group of academic authors and legal scholars. Finally, ASERL, the Association of Southeastern Research Libraries, which is the nation’s largest regional research library consortium, [filed its own brief](#) (which — full disclosure — I had a very small role in assisting with).

Note how clearly these friends of the court break down between those arguing for their own private gain versus those trying to uphold a public good. Given all the rhetoric about copyright as primarily intended to benefit the public interest in hundreds of precedents, the 11th Circuit Court of Appeals cannot help, one would think, but notice this disparity.

Let's look at some of the arguments from a few of these documents.

In the Appellees' own brief (that's Georgia State) we find the fundamental points that are elaborated and supported by all of the *amici*. Primarily, the Appellees argue that all four of the fair use factors weigh more or less heavily in favor of fair use for short excerpts provided as course readings and accessible only by students in a particular class. This argument is supported in the brief from ACE and the other university groups. The GSU discussion is especially interesting on the fourth fair use factor, impact on the market. First, it makes the point that the publishers argument about how the "easy" licensing that is supposedly available should make this factor count against fair use is circular. As many courts have recognized, this argument would undermine virtually all fair use, which Congress could not have intended (although the publishers do), and insofar as Judge Evans accepted it in the trial court, she erred. Then the Appellees go on to point out that that licensing market actually is neither easy nor comprehensive. Fair use continues to be needed in this area even if one applies a market failure standard for fair use, because the "market" for licensing, and even the CCC's blanket campus license, fail higher education far too often. As we will see, other *amici* also support this point.

Two other points made in the Appellees' brief are worth noting. First, they argue, [as I have](#) in the past, that Judge Evans' work-by-work analysis of fair use was the appropriate approach to the case, dictated both by the nature of fair use itself and by higher court precedents. Second, they show that the publishers' reliance on the principle of "media neutrality" is just a silly distraction (my words, not those in the brief). Judge Evans simply did not apply fair use any differently in the digital realm than it would be applied to print works; she distinguished some cases that involved print, but she did so for much better reasons, reasons the publishers would like the 11th Circuit to overlook.

The Library Copyright Alliance also demonstrates, in their brief, that all four fair use factors actually favor Georgia State's fair use argument, supporting from a slightly different perspective the argument made by GSU and by the multiple college and university associations. The LCA goes on to argue that this fair use argument is widely-recognized in the educational community, and that GSU's policy on copyright and fair use is consistent with widespread practices through education. One result of that fact is a clear demonstration that upholding the trial court's finding of fair use would not have any negative effect on scholarship. Colleges and universities have relied on fair use in this way, even in the pre-digital world, for a long time. Yet scholars continue to produce scholarly works at an ever greater rate, undaunted by fair uses made of those works (and they continue, unfortunately, to transfer copyright in those works to these irresponsible publishers). Fair use supports scholarship, it does not undermine it. And the publishers have not discovered any "new" threat to scholarly production that must be averted; they simply decided that they needed and deserved more money from academic budgets.

The LCA also develops the point about the failure of the licensing market for electronic reserves and other course readings. A reversal in this appeal would not cause that market to grow. It would not, that is, actually result in more money in the system to support scholarship, even if we assume that money in publishers' coffers did support scholarship. In fact, if the trial court's findings of fair use were reversed, education would be harmed because fewer resources would be available for teaching, since library and university budgets cannot support the astronomical fees that publishers want to charge for licensing.



The overall effect on the production of scholarly work would be negative, which undermines the fundamental purpose of copyright law in the U.S.

The ASERL brief develops this point a bit further, partly by pointing out that the licensing market touted so highly by publishers is *already* harming the ability of colleges and universities to teach students. On every campus it is easy to find stories about how the inability to get permission, either because of the prohibitive cost of licensing or because no license for the particular work was available, forced a teacher to change his or her plans and resort to “plan B” pedagogy. Most librarians have had to assist such faculty to find other, less optimal, resources in those situations; it is something we do well, but wish we didn’t need to do.

Related to this point is the discussion in the ASERL brief about the cost of higher education, and the role of publishers and licensing in those costs. One statistic the brief cites shows that textbook prices have actually risen much faster in the past 30 years than tuition and fees have, which is a telling refutation of the argument made by the TAA in the article mentioned above. And the structure of digital licensing from the CCC actually contributes to accelerating costs, because the CCC will refund the licensing fees for printed course packs that are not sold, but requires that e-reserve materials be licensed for each student in the class regardless of how many times an excerpt is actually accessed or even whether or not it is used by anyone. Where, by the way, is their concern for “media neutrality” in that pricing policy?

Finally, I want to end this long post by quoting a passage from ASERL’s *amicus* brief that deserves to be remembered by everyone thinking about fair use. In discussing the mistaken assertion by the publishers that all fair uses must be transformative and that, in any case, fair use should be extremely limited in application, ASERL reminds the Court of Appeals that, on the contrary, fair use is an integral and indispensable part of the very structure of U.S. copyright law, without which that law would arguably be unconstitutional:

Fair use is not a rarely-used “exception” to a copyright holder’s rights that should only be applied “on occasion.” [citing arguments from Appellants brief] Rather, fair use is viewed by the courts as “necessary to fulfill copyright’s very purpose.” [citing the Supreme Court in the *Campbell* case]... Fair use is necessary, in part, because “[t]he primary objective of copyright is not to reward the labors of authors, but [t]o promote the ‘Progress of Science’”... [citing the Constitution and the Supreme Court in the *Feist* case]. And for that reason, following direction from Article III of the Constitution, the District Court was correct to apply fair use “in a way that promotes the dissemination the knowledge, and not simply its creation.” [quoting Judge Evans and again citing the Supreme Court].

All of the arguments that support BOTH the creation and dissemination of knowledge line up on the side of affirming the trial court in this case. It ought to be an easy decision for the 11th Circuit Court of Appeals. And it is well past time for scholars and universities to rebel against so-called “scholarly” publishers who try to use the courts to undermine the best interests of research, teaching and learning in a futile attempt to improve their bottom line.

# Time for breakfast at the 11th Circuit

Wed, 29 May 2013 15:23:22, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]

In *Alice in Wonderland*, the White Queen chides Alice about her professed inability to believe unbelievable things, suggesting that it is just a matter of practice. Because of her own discipline in practicing this art, the Queen is able to assure Alice that “sometimes I’ve believed as many as six impossible things before breakfast.” Lawyers, of course, have to be skilled at making arguments even for implausible positions, but the reply brief filed in the GSU copyright infringement appeal last Monday would challenge even the White Queen’s gullibility.

In this brief the plaintiff publishers are attempting to respond to the arguments made in the last round of filings by Defendant Georgia State University and the “friends of the court” who argued on its behalf. This is essentially their last shot at convincing the judges that they should reverse the decision of the trial court that largely ruled in favor of fair use. Unfortunately for the publishers, it is not very convincing.

The core argument of this brief is one the publishers have been making, unsuccessfully, throughout the case — that the so-called “course pack” cases from two decades ago are absolutely dispositive in this case and render incorrect all of the fair use analysis done by Judge Evans in her comprehensive ruling at trial. Some of this argument is based on misdirection, wherein the publishers argue that the judge was treating digital formats differently from print. She did no such thing, of course; she distinguished the situation before her from the course pack cases because the facts were different.

The publisher do address the distinction more directly, however, when they argue that GSU’s non-profit status is (for obscure reasons) not relevant to the fair use analysis. Of course, the course pack cases explicitly rejected fair use precisely because the defendants were commercial entities who were selling the course packs to students. In the GSU case, on the other hand, the university is non-profit and the readings are made available at no charge. It is absurd to say that this difference doesn’t matter. In fact, at least one publisher I have dealt with granted gratis permission for an excerpt on e-reserves only after I assured them that no charge was made to students. So even publishers understood that this was a crucial fact in determining the appropriateness of unlicensed uses in academia, before their lawyers told them they had better deny it.

From this basic assertion that the matter was already settled by different courts back in the 90’s, the publishers proceed to explain that the trial court was wrong on every one of the four fair use factors. Much of the argument is very strange, twisting back on itself in an effort to obscure the clear and cogent path that Judge Evans used to arrive at her original ruling. Its overall effect, however, is to emphasize what a sensible, careful analysis that trial court opinion offers.

It is, perhaps, worth looking at some of the general statements made in the opening summary of the brief’s argument to find some clues about how this analysis went so badly wrong.

First, of course, is this assertion that fair use is not supposed to favor non-profit educational uses. We have heard this complaint many times over the long course of these cases, but here is last week’s version of it:

To sanction GSU's practices under the rubric of fair use on the grounds urged by Appellees — GSU's non-profit status and the importance of Appellants' work as teaching tools — would undermine fundamental tenets of copyright law **by effectively dedicating the works of scholarly publishers to the public domain.** (emphasis added)

This is truly a staggering bit of argumentation. First, a non-profit purpose is specifically mentioned as favoring fair use in the text of section 107 itself, so it is hard to see how it could NOT be an appropriate part of a fair use argument. And a quick look at all of the exemplary purposes for fair use that are also mentioned in section 107 should convince any unbiased reader that social utility — the importance of education, for example — is the fundamental purpose for which fair use was created. Indeed, courts have told us this over and over. So the rubric suggested as inadequate is, in fact, a nice, concise statement of why the original ruling in this case was correct. And then, the grotesque hyperbole that follows illustrates for us that the lawyers writing this brief know how far out on a limb they have climbed. To say that a fair use finding effectively dedicates a work to the public domain is simply absurd. I do not think the publishers could cite a single instance where fair use has had that effect, where the original became unmarketable because someone made a fair use of a portion of that work. When movie companies challenged the video recorder, for example, by saying that it would destroy the movie industry, they were making a parallel, and equally silly, claim; home video recorders, of course, did not harm the market for movies at all, even though entire films could be recorded under the Supreme Court's ruling on fair use.

And of course, we should not ignore that phrase "the works of scholarly publishers." Throughout this brief the publishers are not sure whether they are arguing for their own profits or on behalf of authors. Sometime they throw the authors in to their argument, but mostly they want the court to believe that they, the publishers, actually created the works in question *ex nihilo*. But none of these works were created by publishers, and their argument collapses when we realize that the fees they are seeking have virtually no role at all in incentivizing scholarly creation, which is what copyright is for. More about this in a minute.

But before we leave fair use proper, we should also examine this gem: "Fair use ... imposes on the proponent of fair use the burden of demonstrating the limited nature of the unauthorized use ..." There is no such requirement in the text of the law, of course, and the *Sony* case about VCRs illustrates, at the highest level of U.S. legal precedent, that simply because a practice is widespread does not prevent it from being a fair use.

To return to the issue of incentives, let's look at one more passage from the preliminary statement in this brief:

This blatant end-run of copyright law not only threatens to undermine the established legal norms that have long governed course-pack copying, but it comes at a time when Appellants and other academic publishers are investing heavily in publishing and delivering content in digital form. These publishers cannot hope to recoup their investment if institutions like GSU are permitted to make exact digital copies of their works ... without compensation to the works' authors and publishers.

The first part of this quote is, as we have already seen, irrelevant; a fair use ruling in the GSU case would not alter the precedent created by the course pack cases, when those cases are properly understood. But the second part is also interesting, and it echos an earlier statement, quoted from one of those course pack cases, about how publishers have "risked their capital to achieve dissemination." By way of

reply, we should note first that dissemination is quite different now than it was nearly twenty years ago when that case was decided. Many Gold OA journals and other forms of digital writing can be distributed with much less expense than these traditional publishing houses claim is required. So we are entitled to ask if it is being done efficiently by them; whether that capital the Court is asked to protect is being invested wisely. And in any case, copyright law is not designed to support any particular business model, but to give creators more reason to create.

Given these statements, the Appeals Court would be justified, I think, in asking the plaintiffs to open the books and show how much investment is being made, how it is being spent, and how dependent that investment really is on permission fees. The trial judge did not think those fees mattered all that much to publisher revenue. If the plaintiffs continue to assert that their business will be ruined by fair use, they should be obligated to prove it, and also to show that the threat is systemic and not just the result of poor management.

Finally, it is worth noting that authors have now appeared in the argument. Whereas earlier the issue was “the works of scholarly publishers,” now, in classical fashion, the authors have been belatedly recalled and tossed in to the mix. Publishers have made pathos-filled appeals on behalf of starving authors in order to justify their own businesses since copyright began. But academic authors are different, so this reflexive reference to authors should not go unchallenged. In response to this argument, there are two questions the Court of Appeals should examine closely. First, how much money actually makes its way into the hands of authors, rather than the publishers, from permission fees paid to the Copyright Clearance Center? Second, what role, if any, do these fees play in creating the incentive that academic authors have to create scholarly monographs, recognizing that all of the books in question in this lawsuit are such monographs, rather than textbooks. These questions are perfectly within the competence of the Court of Appeals, both because they are relevant to the second fair use factor and because the publishers’ reply brief has put them at issue.

The Eleventh Circuit Court of Appeals is asked to swallow lots of unbelievable things in this reply brief. Now is the time for them to sit down at the metaphorical breakfast table (harkening back to the White Queen) and demand substantive information from the plaintiffs before they finish this meal.

# Better than joining the CHORUS

*Mon, 10 Jun 2013 08:43:31, ksmith12@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Last week we saw two proposals about how the various federal agencies that fund research might implement the recent directive from the White House Office of Science and Technology Policy that mandates public access to the products of funded research. A group of publishers unveiled (sort of) a proposal they call CHORUS, while the Association of American Universities, the Association of Research Libraries and the Association of Public and Land-grant Universities collaborated on a different proposal, referred to as SHARE.

The publishers proposal — the acronym stands for Clearing House for the Open Research of the United States — is described in [glowing terms on the Scholarly Kitchen website](#) and with a bit more restraint by the [Chronicle of Higher Education](#). The proposal from the education associations, dubbed Shared Access Research Ecosystem, is also [described by the Chronicle](#) and is the subject of a [detailed draft proposal that can be found here](#).

For myself, I would rather SHARE than join the CHORUS, for a number of reasons.

First, I think CHORUS is being touted, at least in what I have read, by comparing it to a straw man. Its principle virtue seems to be that it would not cost the government as much as setting up lots of government-run repositories, clones of PubMed Central. But it is not clear that that option is being seriously suggested by anyone. Certainly many of us encouraged the agencies to look at the benefits of PMC for inspiration and not sacrifice those benefits in their own plans, but that does not mean that each agency must “reinvent the wheel,” no matter how successful that wheel has been. So the principle virtue of CHORUS seems to be that it does not do what no one is suggesting be done.

The most important thing to understand about CHORUS is that it is a dark archive. The research papers in CHORUS would not be directly accessible to anyone; they would be “illuminated” only if a “trigger event” occurred. Routine access would, instead, be provided on the proprietary platforms of each publisher, while the CHORUS site would simply collect metadata about the openly-accessible articles and point researchers to the specific publisher platforms.

It seems to me that the CHORUS proposal is “disabled” from the start, by which I mean that it lacks three fundamental abilities. CHORUS, at least based on the descriptions we have seen, lacks find-ability, useability and interoperability.

Perhaps the most troubling remark in the description offered on the Scholarly Kitchen blog is that “Users can search and discover papers directly from CHORUS.gov or via any integrated agency site.” Does this mean that even the collected metadata would not be available to Google? We know how few researchers “walk through the front door” of our research tools, so limiting discovery to the CHORUS portal or “integrated agency sites” would make these open access papers virtually invisible (which, one suspects, is the point). As things stand now, open access papers which reside on proprietary publisher platforms are difficult to find because there is no consistency in how they can be discovered. That is the principal reason so many COPE fund institutions will not support so-called “hybrid” open access publishing that makes a few articles open on an otherwise toll-access site. It does not seem that CHORUS would change that unfortunate situation at all, which is probably why Heather Joseph of SPARC calls CHORUS “a restatement of the status quo.” The public would gain very little, since the major goal

of the proposal is for the publishers to cling tightly to control over the research papers that have been entrusted with.

Another ability that CHORUS would lack is useability, since as far as we know, all that a researcher or other user could do with these papers is read them. It would not, of course, facilitate sharing, teaching or reuse, even those these abilities are vital to improving the speed and quality of research in the United States. And then there is interoperability. If the geographically desperate archives are genuinely federated, searches across all of them, even keyword searches that are not dependent on the metadata created for each article, would be possible. So would text and data mining across a large corpus of works. We already know that such interoperability creates tremendous new opportunities for expanded research, collaboration, and previously impossible discoveries. But there is no reason to believe that CHORUS would support interoperability, since the various publishers have a strong competitive interest in not allowing cross-platform activities. Research and education, however, not only do not benefit from that competition, but are actively “disabled” by it.

On the other hand, the proposal from the universities and their libraries is for a genuinely federated system of university-based repositories. Those repositories already exist, so if we are going to make a cost argument, it really favors SHARE. And these repositories, unlike the publisher platforms, have a strong interest in facilitating discovery. Also, the detailed proposal offered by these groups addresses text and data mining, semantic data, APIs for research and linked data. All of these things make university-based research better, while they pose threats to the commercial publishers who have designed CHORUS to protect themselves, not to benefit research or the public. So all the incentives line up between the public interest and the university-based SHARE system.

If the OSTP and the research-funding agencies take seriously all of the opportunities that were described in the comments they have solicited over the past year, it will be very obvious to them that CHORUS is singing flat, while it would be good to SHARE, just as our parents always told us.

# Museums can get copyright right

*Fri, 14 Jun 2013 14:19:24, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain, category: user-generated-content]*

One type of question that I get over and over again from faculty and graduate students involves copyright and images of art works held in museums. In fact, question is probably the wrong name for these discussions; mostly I try to be sympathetic as the researcher bemoans the thicket of claims and permission costs in which they have become entangled as they undertake some project. I recently met with one faculty member who is creating an amazing “digital humanities” project and needs to obtain, from a significant number of different museums, high-res images of works that are clearly in the public domain. Even this author, who is both remarkably good-humored and very persistent, was confused and bemused by the Pandora’s box she had opened.

Then I saw [this article about the Rijksmuseum in Amsterdam](#), which reminded me that even in Pandora’s box, hope remained in the bottom — some museums are bucking the trend and creating reuse-friendly policies for images of public domain works.

Whenever I am asked about the process of getting “copyright permission” from museums to use images of artworks in a new project, I start by explaining three basic principles:

1. Many of the artworks held by museums around the world are in the public domain, either because they were created before copyright came into existence in the late 17th and early 18th centuries or because any copyright they had has expired. And even for works that are still protected by copyright, most often the museum that owns the art work does not also hold the copyright.
2. Even a photograph or digital scan of a public domain artwork that is created by the museum may lack copyright protection under a U.S. District Court decision that said that such “slavish” reproductions — reproductions that add nothing but attempt \*just\* to accurately reproduce the work — are not original enough to gain any copyright other than whatever protection the underlying work enjoys (which, if the work is public domain, is none). This is only a District Court case, but it has never been appealed or, to my knowledge, otherwise challenged so it probably should guide us unless or until we get something more definitive.
3. Museum claims over the use and reuse of images from their collection, even though often called and often understood as copyright claims, are really mostly a matter of contractual agreement and simple control over access to the unique works that the museum holds. Because these works are (more or less) unique, the ability to make a reproduction can be tightly controlled and the museum can impose contractual conditions on access to make such a reproduction or on the reuse of a museum-supplied image. These contractual obligations actually bind only the parties that agree to them, but in practice they are often passed to downstream users in the form of conditions on reuse that the original recipient feels bound to impose.

All of this is explained very elegantly and discussed in great detail in a superb article written on the topic by Kenneth Crews of Columbia University, [which is available here](#). It is a subject all librarians, in my opinion, should understand, so the article deserves a wide readership. Dr. Crews points out both that many claims made by museums tend to stretch the copyright law beyond reasonable bounds AND that some of the claims for control and remuneration are supported by sound business practices and cultural

policy considerations. This is not a black or white issue, just one where more clarity and an open discussion of genuine needs and concerns can lead to better conditions for the reuse of artworks and images.

Which brings me to the Rijsmuseum. Their decision to offer high-resolution images of many works in their collection available for free download is a startling example of the other side of this issue — there are good reasons, especially from the perspective of fundamental museum missions to make culture more accessible to the public, to take the opposite approach from that of some museums and support radical reuse. I was struck by the reasoning behind allowing even commercial reuse of these high-res images:

If they want to have a Vermeer on their toilet paper, I'd rather have a high-quality image of Vermeer on toilet paper than a very bad reproduction.

Maybe the example chosen is not one involving high culture, but it illustrates quite dramatically that reuse of public domain art is inevitable, even for purposes we may deplore, and that the public is, in many cases, better served by access to good-quality reproductions than it is by complex contractual terms and absurd restrictions on even the most traditional practices (like sketching an artwork at the Art Institute of Chicago). If we must choose between extremes, there is a great deal to recommend the Rijsmuseum approach.

As libraries, museums and archives work to digitize more and more of the public domain materials that they hold, it is worth considering how others will be able to use and reuse those images. With so many digital humanities projects being pursued around the world, the thickets of permissions and use restrictions will grow evermore burdensome. An example like the Rijsmuseum is a great counterweight to that burden, and a graphic reminder that it really does not have to be that way. Of course, not every cultural institution can afford to make high-res reproductions available for free; fees are often essential to support the mission-driven activities of these collections. So fees may be needed for the provision of high-res images, as may some restrictions on further dissemination of those images. But many of the restrictions and fees we often encounter cannot be justified in this way. So if we start from the very open policy of the Rijsmuseum and then apply only those restrictions that have sound, policy-based foundations, we can arrive at much more supportive approaches to reuse and new creativity. The [policy adopted by the Cornell University Library's digital collections](#) is, in my opinion, a model of such a moderate and sensible approach.

For those beginning to explore the uncharted territory of the digital humanities, permission fees and reuse restrictions will probably continue to create nearly unnavigable thickets of complication. But with these few counter-examples, we can see that a better approach is possible. Libraries and the digital archives associated with them need to model the best practices that we can in hopes that the most absurd kinds of copyright overreaching will become less common and rational policies based on an accurate assertion of rights and a realistic assessment of needs will begin to dominate.



# Of fences and defenses

Thu, 20 Jun 2013 15:19:16, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

It is very common to hear people say, in a discussion of copyright, that fair use is “an affirmative defense.” One of the amicus briefs filed in the Authors Guild’s appeal of the favorable fair use decision in their lawsuit against the HathiTrust, however, puts that common assertion into question and raises an argument worth considering. The [brief on behalf of the HathiTrust that was filed by a group of universities](#) (Illinois, Michigan State, Minnesota, Nebraska, Northwestern, Penn State and Purdue) argues at some length that fair use is not and was not intended as an affirmative defense but is better viewed as a positive limitation on the rights held by a copyright owner. They argue, in short, that fair use is not so much a defense as it is a fence — a boundary that courts have built to prevent the exclusive rights in copyright from expanding too far. (Hat tip to Jack Bernard of the University of Michigan, who pointed this argument out to me but is not, of course, responsible for what I make of it).

To understand this argument, and to see what difference it makes, let’s start by defining an affirmative defense. *Black’s Law Dictionary* tells us that an affirmative defense is “an assertion by a defendant that raises new facts and arguments that defeat the plaintiff’s claim even if all of the allegations in the complaint are true.” When one raises an affirmative defense, one basically says that “even if I did exactly what the plaintiff says I did, I should be excused because of these additional reasons which justify my actions.” Self-defense is a classic affirmative defense, as is duress. In the latter case, for example, someone charged with writing a fraudulent check might say “yes, I signed that check knowing it was a fraud, but at the time I was being threatened at gunpoint if I did not do so (i.e., I was under duress).”

It is easy to see why fair use seems like an affirmative defense; the general assumption is that a defendant in a copyright infringement lawsuit admits, when raising fair use, that they were responsible for the use being challenged, but that that use was authorized by the law under section 107 of the Copyright Act. Well-known copyright scholar William Patry takes [exactly this position in a 2005 blog post](#), although he also adumbrates the argument that the amici universities are making in the HathiTrust brief.

The “public relations” problem with this position is that talk about affirmative defense is often used to frighten potential users of copyrighted works away from their proposed use by telling them that if the copyright holder objects, they will have to “prove” fair use, which is difficult and expensive. The legal problem with maintaining that fair use is an affirmative defense is found in that word “prove” — the HathiTrust amici maintain that, because fair use is NOT an affirmative defense, the burden of proof shifts to the plaintiff, who should be required to prove that the use in question violates their rights.

Burden of proof is very important in most litigation. We all know that in a criminal trial, it is the state which must prove “beyond a reasonable doubt” that the defendant committed the offense. In a copyright infringement case, which is usually a civil trial rather than a criminal one, the standard of proof is lower — usually infringement must be proved by “a preponderance of the evidence.” Here is how the jury instructions for the federal courts in the Ninth Circuit describes this requirement:

the plaintiff contends that the defendant has infringed the plaintiff’s copyright. The plaintiff has the burden of proving by a preponderance of the evidence that the plaintiff is the owner of the copyright and that the defendant copied original elements of the

copyrighted work. Preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that the copyrighted work was infringed.

If fair use is an affirmative defense, the burden of proving those additional facts that would establish the defense falls on the defendant. She has to show that her otherwise infringing use was authorized by the law. But the HathiTrust amici argue that that is not how fair use works. They suggest, based on language in the statute, that fair use is about establishing the plaintiff's right in the first place, so that the burden falls on that plaintiff to show **that they have any right** to prevent the particular use.

This is the difference between admitting the plaintiffs' assertions and then arguing that there was a justification for the otherwise infringing activity versus denying that plaintiffs' basic claim that they hold the right to object to the use in the first place. It is an argument that fair uses simply fall outside of the scope of the copyright holders authority in the first place. On the other side of a statutorily-defined "fence." Then it becomes that copyright holders' obligation to convince the court that their rights DO reach as far as they say they do.

As I said, the HathiTrust amici assert that the language of the copyright law supports this argument. The section that enumerates the exclusive rights in copyright is immediately followed by a series of limitations on those rights, and fair use is the first of these limits. The fair use provision says that a fair use "is not an infringement," "notwithstanding" the rights granted just one section earlier. This sounds like the scope and extent of the rights are being defined. And just one more section later the law refers to "the right of fair use," language that further suggests that fair use is much more than a defense. Indeed, it looks like Congress was telling us that fair use is a positive right, the existence of which defines the inherent limits of the rights given to copyright holders.

By the way, this perspective is also useful in thinking about the publisher arguments in the GSU lawsuit. The publishers' reply brief in that case, about which [I wrote](#) a couple of weeks ago, asserts that those who claim fair use have "the burden of demonstrating the limited nature of the unauthorized use." Not only is there no such requirement about fair uses being "limited" in the legislative or judicial definition of fair use, but this assertion potentially gets the burden of proof wrong. It is the plaintiff publishers, according to this perspective, who must show that the use in question is not fair use and therefore that they are entitled to assert any control over it.

If these seven amici universities convince the Court of Appeals panel, it will make a big difference in how the arguments proceed. Since plaintiffs must first, as everyone agrees, show that they own a right that has been infringed, this argument would mean that it was up to them to convince the panel that the use was not fair use as part of that initial showing. But it could be even more influential on the "public relations" issue I spoke of. If we understand fair use as a positive right that creates a boundary limiting the control of rights holders, we ought to be less afraid of exercising it. After all, we do not fear to walk on a public sidewalk just because some landowner might scream "trespass;" we recognize that rights over land have boundaries and do not shirk from exercising our positive right to use public land. The argument in this amicus brief points us to a similar confidence when exercising our fair use right. While we should respect the legitimate rights held by an intellectual property holder, we should not let attempts to expand those rights beyond the boundaries set by Congress dissuade us from making fair use of materials under this public right that is equally a defining part of copyright.

# Parallel tracks, parallel successes

*Tue, 02 Jul 2013 14:22:25, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

The two lawsuits currently going on that involve the scanning of books for the Google Books project, one against Google directly and the other against the HathiTrust, raise very similar issues. In both cases, the two major issues are fair use and the posture of the plaintiffs who are bringing the cases in the first place. The Authors Guild is now the major plaintiff in both cases; they are the only plaintiff left in the case against Google because the Association of American Publishers settled out of it, and the AG brought the case against HathiTrust by itself in the first place.

Yesterday the Second Circuit Court of Appeals [issued a ruling](#) in the Google Books case that takes an important approach to the issue of how fair use and the “standing” question (who can bring a lawsuit and in what position they stand) are related, and it reminds us of the parallel tracks along which the two cases seem to be moving.

As many will recall, the Google Books case has been going on for a very long time. There was a complicated settlement agreement proposed back in 2009, but it was ultimately rejected by Judge Denny Chin. Since then the AAP has gotten out of the lawsuit, and it has gone to trial with only the Authors Guild as the lead plaintiff against Google, asserting copyright infringement. Early in that trial, Judge Chin (who is continuing to act as the trial court judge for this case even though he has since himself been appointed to the Second Circuit Appeals Court) “certified a class” for the purposes of allowing the case to be a class action lawsuit. Because it was not at all clear that the plaintiffs in the case really do represent all authors, or even a majority of authors, Google appealed this class certification

In its July 1 decision, the Court of Appeals held that their colleague was “premature” in certifying the class. They said that the trial court should consider the fair use issue that defendant Google had raised prior to determining class action status. There are news reports from [Reuters](#) and the [NY Times](#) on this stage of the case.

What makes this so important is that class action certification can really be the end of a case for practical purposes. The process of litigating a class action is so complex and expensive that class action certification is often a signal to the defendant to settle the case. The result is that, if a class is certified, there is much less chance that a full determination about fair use will ever be made. In this case, the fair use argument is very strong, and virtually identical issues were decided in favor of fair use at the trial level of the HathiTrust case. So it would be very unfortunate if the Google case never got to that stage. By fighting off the class certification, Google has won for itself a better opportunity to make that argument. And the precedent set by this decision is important, since it tells trial courts to consider fair use before they make the potentially destructive decision about class certification. In many cases, and the Second Circuit suggests that this may be one of them, the complexity and cost of a class action might be entirely avoided because fair use would lead to a lawsuit being dismissed before it got that far.

One interesting note is that Judge Pierre Leval was part of the Appeals Court panel that made this ruling. Judge Leval wrote the famous law review article called “Towards a Fair Use Standard” that is the foundation of the recent stress on transformative uses in the fair use context. Now, as part of this three judge panel, he has sent back to the trial court a case where the fair use standard he suggested is very, very applicable. So we will see if Judge Chin takes the strong hint that he has been given by his Second

Circuit colleagues (including Judge Leval and the rest of the appellate panel, as well as Judge Harold Baer, who ruled in favor of fair use in the HathiTrust case) and finally dismisses this case on fair use grounds without letting it grow into a class action.

As I said, the issue of whether or not the Authors Guild can really adequately represent the class of all authors is also very important. Their membership is quite small — apparently less than 10,000 people — compared to all of the authors in the United States, and the interests they represent are even narrower. They seem to focus on the need to protect every copyright for ongoing and exclusively commercial exploitation, in blissful ignorance that many, probably most, authors do not make any significant income from writing and often feel that exposure and impact are far more important incentives for authorship.

It is on this point that yesterday's decision so clearly shows us that the Google Books and the HathiTrust lawsuits are on parallel tracks. Late last year the trial court in the HathiTrust case made two important rulings. The first was that the activities of the HathiTrust that had been challenged were fair use. The second was that the Authors Guild could not assert "associational standing" to bring the case. Now the Appeals Court has sent the Google Books case back to the trial court for consideration of the fair use issue and reconsideration of the association's standing (in this instance, whether it is an adequate class representative). On this second point the panel said that it did not have to decide the issue of adequate representation because a fair use decision might well moot the class action issue, but it indicated that the argument that the AG was not inadequate as a class representative "may carry some force." Now we might see a situation in which the Google case is resolved the same way the HathiTrust lower court case was — the activity is fair use and the Authors Guild is not a proper party.

It would be nice if the Authors Guild took this ruling as an opportunity to back out of the case. But they have already appealed the HathiTrust verdict, and there is little reason to suppose that the AG will suddenly be seized by a fit of good sense. So we must watch these lawsuits, brought out of a misplaced desire to force copyright to be something it is not and never was intended to be, get decided step-by-step in favor of fair use. This latest decision, which will compel courts to consider fair use at an earlier, and potentially less devastating, point in a putative class action is, as they say, "another brick in the wall."

# Small steps

Mon, 15 Jul 2013 14:56:52, ksmithl2@duke.edu, [category: libraries, category: scholarly-publishing]

Court cases rarely result in sweeping victories for anyone. The *Kirtsaeng* case decided earlier this year by the Supreme Court was an anomaly in this regard; the court held that the doctrine of first sale applied in the United States to any lawfully-made copy of copyrighted material, regardless of where it was manufactured. Although no library was a party to the lawsuit, that was a complete victory for libraries, as well as for Mr. Kirtsaeng. But as I say, that is unusual. Most of the time, court decisions do not completely satisfy either side, nor do they represent complete vindication for any one set of interests. And if this is true about final decisions, it is even more the case when the ruling is about only one aspect of an ongoing case.

All of this is by way of saying that we should not read too much into some recent decisions, even though both contain small nuggets of encouragement for libraries.

I already wrote about the decision to reverse class certification in the Google Books lawsuit brought by the Authors Guild. There is another perspective on that decision [here](#). But that case is a good example of what I mean. It is encouraging that the class certification was reversed, provisionally, since so many academic authors are not represented by the position taken by the Authors Guild, and it is great to have the trial court instructed to consider fair use prior to deciding about the class action status of the case. But there is still a long way to go in that case; Judge Chin has just scheduled the briefings and oral arguments for the next stage. We cannot yet say for sure that Google Books is or is not a fair use, and even after a final ruling there will probably continue to be disagreement and room for dispute.

It is in this context that we should look at the ruling from the Southern District of New York in the Justice Department's lawsuit against Apple over e-book pricing.

This was not merely a procedural ruling, to be sure. It is the [final decision](#) of the trial court, which held that Apple and the major e-book publishers conspired to set prices above the standard that had been set by Amazon's dominance of \$9.99 per title. The judge expressed no doubt that there had been a "combination in restraint of trade" that violated the anti-trust laws of the United States.

It is important to note that this finding involves both Apple and the five major e-book publishers. Even though all of the publishers settled out of the lawsuit, their behavior is very much at issue. Consider this quote, in which "plaintiffs refers to the U.D. Department of Justice, the State of Texas and others (the full opinion is [here](#)):

The Plaintiffs have shown that the Publisher Defendants conspired with each other to eliminate retail price competition in order to raise e-book prices, and that Apple played a central role in facilitating and executing that conspiracy. Without Apple's orchestration of this conspiracy, it would not have succeeded as it did in the Spring of 2010.

In a similar vein, the Judge is very clear that neither the Apple executive nor the publisher CEOs who testified were credible to the court.

Obviously this lawsuit, which will certainly be appealed by Apple, has some implications for libraries in their ongoing quest for reasonable and workable terms for e-book acquisitions. Perhaps the Judge's

orders in the case can help level that playing field a little bit. But the case is not really about libraries, and we should not draw sweeping conclusions or direct analogies from it. I want to suggest three general lessons for the rest of us to take from this case.

First, the digital environment is still new and frightening to many in the publishing industry. They are trying to find ways to control the Internet and to make all the money they think it promises to them, but they are falling behind the curve. Libraries, especially, need to take what they are told by publishers with several grains of salt and keep open all of our options for the digital life of scholarship. The publishing industry worked very well for libraries and scholarship in the print era, but now as that industry alternates between wooing and threatening us, we need to acknowledge that, in these changed conditions, they may simply no longer be reliable or trustworthy partners.

Second, for anti-trust laws to be violated, some kind of collusion or conspiracy has to exist. Simply charging an outlandish price is not an anti-trust violation. Nor is simply refusing to pay an outlandish price. Where there are problems is where there are organized boycotts by consumers to try to force prices down and where there are agreements amongst competitors to try and force them up. An individual library is free to walk away from some of the most one-sided deals it is offered, and even to tell others that it did so and why. And even groups are free to boycott when the issues on which they want to put pressure are not price related, as in the *Cost of Knowledge* boycott of Elsevier, which focused on the fair treatment of authors.

For anti-trust liability to attach, there must be collusion focused on preventing free market competition between those who can marshal power in that market. The conspiracy can be covert and secretive — there does not have to be a “smoking gun” — but it must exist. In this e-books case the judge had no troubling documenting such a conspiracy. But the basic parameters required for that element of an anti-trust violation can help us in libraries determine the things we can do to bring pressure on publishers that would not rise to the level of such “combination in restraint of trade.”

Third, anti-trust laws cut both ways. In libraries we are often concerned that we need to avoid liability for collusion that might restrain free trade. But this must also be a concern for publishers, as the Apple case shows. Many issues that libraries face, including bundling of journals and e-books, could create anti-trust liability for the vendors as well. It all depends on whether or not there is a conspiracy or the exercise of excessive market power. So libraries should be vigilant, both about their own actions and about the way they are treated as consumers; we should avoid collaborations designed to reduce prices, but also be willing to challenge price-fixing.

# Repeating myself about the WIPO treaty

*Thu, 11 Jul 2013 10:56:01, ksmithl2@duke.edu, [category: uncategorized]*

I do not usually link and re-post my own work on this site, but this situation is a little different. I have written two columns for Library Journal's Peer-to-Peer column about the WIPO's successful negotiations to arrive at a treaty dealing with copyright limitations for the blind and visually impaired. It seems odd not to address those negotiations and the treaty that came out of them at all in this space, but there is also no reason to reiterate what is available on the Library Journal site.

So in the interests of appropriate inclusion and efficiency, here is the link to the [column I wrote before a treaty had been agreed on](#), and here is the [column released today that addresses the result](#) of the negotiation process. There are lots of other sources of information about the treaty, but I hope readers find these comments useful.

# The problem with permission

*Thu, 18 Jul 2013 15:17:22, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: licensing, category: scholarly-publishing]*

Because Duke has begun teaching Massively Open Online Courses (MOOCs), my office has gotten much more involved, over the past year, in the process of seeking permission to use copyrighted content. We began a new service to help MOOC instructors make careful fair use decisions, find freely-licensed content for their courses, and get permission for materials where we deem it necessary. The [story of the first year of that service is told in this article](#) that has just been published by [D-Lib Magazine](#), written by Lauren Fowler, our first permissions intern, and me.

From the perspective of one asking a rights holder for permission to use some content, the process has a lot of frustration, some of which we detail in the article. The most common frustration, as many people have discovered, is that so many rights holders simply do not respond. They are not obligated to, of course, but even a simple “NO” would save lots of wasted effort and time on both sides of the exchange. Yet a significant number of rights holders do not even send that; in our article we note that 23.5% of our requests garnered no reply at all, even after several contacts.

Sometimes, however, it is even more frustrating to receive a reply, because those answers often confirm that we are not dealing with a well-managed or carefully-administered process. Frequently when we do get a response, what we hear back clearly indicates that the staff member who contacts us is unaware of what we have actually asked. We have a carefully written request letter that is very clear about exactly the use we intend to make of the work if permission is granted, yet over and over the rights holder’s staff replies with inapposite questions or, amusingly, a grant of permission to do something else entirely.

One example can illustrate this humorous frustration. Shortly before she left to take up a full-time library job, Ms. Fowler sent a letter to a major motion picture studio because one of our instructors wanted to use an illustration from a movie in a way that was probably fair use but for which we decided to ask permission, since it is a well-known picture and MOOCs are receiving so much attention and such large participation. We got back a very nice message from a permissions rep saying that “the attached letter should cover your use.” Unfortunately, the attached letter was a painstaking, though inaccurate, description of the exception for the public display of a copyrighted work in the course of face-to-face teaching. I reviewed our multiple requests, and it seemed impossible not to understand that we were asking about an online use. Yet we were told that a letter about physical classroom use, for which permission is not even required, would serve our purpose. This left us at loss about how to proceed; we didn’t really have the needed permission, but it seemed like the rep was *trying* to grant it. Maybe she just attached the wrong form letter. So what do we do, as the time to make decisions about course content grows short?

It is certainly possible to conclude from the experiences we have had, which many others have also reported — see Susan Bielstein’s wonderful book on “Permissions, A Survival Guide” — that large rights holders simply are not interested in giving permission, or even in asking for permission fees. The experience seems to confirm what the judge in the Georgia State case held in her ruling, that permission income is simply not that vital for most rights holders, so they invest very little time and energy into processing permission requests.



But recently I have dealt with two requests from the other side — requests directed at Duke from two large textbook publishers for permission for them to use content putatively owned by us in books they were publishing. Astonishingly, the same *laissez faire* attitude seems to prevail when the big content company is doing the asking as it does when we are seeking permission from them.

In the first instance, a big textbook publishers sent an e-mail asking for permission to reuse an image, and a high-res scan of the image, to the Coordinator of Academic Support in our Office of Information Technology. That person was clearly mystified — she is not engaged in IP issues or rights in any way — so she got in touch with me. I could see very clearly that the image in question had been published by the Duke University Press, so we were able to redirect the request. But we had to do the research (which was easy) because the company did not bother.

When this request finally reached the correct folks at Duke Press, they were shocked at the shoddy effort that the textbook publisher had made. Even with more limited resources, I know from experience that DUP does much better work. But the folks at the Press were inclined to see this as isolated incompetence on the part of a company with, it seems, a less than stellar reputation. Unfortunately, the very next day I received confirmation that the problem is not isolated at all.

Yesterday I received a similar request from a different major textbook publisher. It was directed to me, which is perhaps a little more sensible than selecting a random person from IT; I get these types of requests quite often, and routinely try to direct them to the right office. But this one was especially difficult, because it just attached a scan of a page from a published work, and asked for permission to use “the attached.” The request gave us no idea of where the page had been originally published, what part of that page was the focus of the request, or why the request had been sent to Duke in the first place. An email to the publisher rep who sent the initial message told us that they were seeking permission to use only a single sentence quotation from the page, which is absurd. And the request apparently came to us because of a connection between the publication and one of our collection centers. So I forwarded it to the collection curator, but shook my head as I did so at the bumbling way these and so many other requests from permission come to us from those who yell loudest about the need to base our copyright system on permission.

It is hard not to conclude from these and similar experiences that the publishers sending the requests are not really interested in contacting the correct rights holder or in defining an appropriate scope for a license. They appear to simply be trying to collect paper — any message or letter that says the use is OK is sufficient to be filed away and forgotten. From the other side, when we make a request for permission the same attitude prevails. Little effort is made to accurately understand the request or craft an effective license.

Permission from a rights holder can solve many problems; it is an important part of a complete IP rights strategy in the digital environment. But it is not a process for the faint of heart, nor a solution to be suggested lightly. Even large professional publishers seem to find it overwhelming or, perhaps, not worth the investment of staff time and effort. So when, in debates or litigation over copyright issues, rights holders groups assert that permission is the best solution and copyright exceptions should give way to a licensing process, we need to counter those claims by telling these sorts of stories. Many of us can recount similar instances, and also catalog teaching opportunities that have been lost because permission was simply not available. Judges and legislators need to know about these problems with permission, because they reenforce the wisdom — the necessity — of building exceptions into copyright and not relying on the whims and dubious competencies of rights holders to manage a permissions-based culture.

# ETDs, publishing & policy based on fear

Wed, 24 Jul 2013 06:52:35, ksmithl2@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]

The July 2013 issue of *College & Research Libraries* contains an important article on the question “[Do Open Access Electronic Theses and Dissertations Diminish Publishing Opportunities in the Social Science and Humanities?](#)” The article reports on a 2011 survey of publishers, which follows up and refines several previous surveys done to see if publishers really do decline to publish revised dissertations when the original work is available in an open access repository. All of these surveys found the same thing — a large majority of publishers DO NOT treat the existence of an open access ETD as prior publication that disqualifies the revised version from publication. In fact, while early studies asked the question of whether or not ETDs were considered prior publication and found that about 15-25% said they did, when the 2013 authors phrased the question differently — how do you approach revised versions of manuscripts derived from OA ETDs — the percentage of publishers who said they would not consider those manuscripts was even lower, consistently less than 10%.

By far the majority of journal and university press publishers told the authors that such manuscripts were either always welcome or considered on a case-by-case basis. It is naturally true that dissertations have to be significantly revised prior to publication, but that is the case regardless of whether or not the dissertation is online. Consider these two quotations from survey respondents, one from a university press and one from a scholarly journal:

We normally consider theses or dissertations for publication only if the author is willing to significantly revise them for a broader audience; this is our practice regardless of the availability of an ETD.

Readers will consider our article to be the version of record, the version they should read and cite, because (a) it will have been vetted by our double-blind peer review process, (b) it will have been professionally edited, and (c) it will be the most up-to-date version of the material

This does not sound like publishers who are afraid of ETDs. Indeed, even the very low numbers about publisher reluctance may need to be set in further context, since I think they still over-estimate the degree to which open access is the root cause of whatever difficulties there may be in getting a revised dissertation published. More about that in a bit.

But first we need to address this [farfetched statement from the American Historical Association](#) asking institutions that adopted ETDs to provide embargoes on OA of up to six years. The AHA says it is afraid that ETDs may inhibit opportunities for students to publish their dissertations; they specifically claim that “an increasing number of university presses are reluctant to offer a publishing contract to newly minted PhDs whose dissertations have been freely available via online sources.” But they offer no evidence for this claim, and the evidence that is out there, including this most recent survey, directly contradicts the assertion. This is not the way a society of professional scholars should work; policy should be based on data, not merely fear and rumor. And factual claims should be sourced. Every scholar knows this, of course, but the AHA asserts an “increasing number” without citing any source, possibly because the available sources simply do not support the claim. It is ironic that the AHA, in a statement purporting to defend the interests of graduate students, models such bad scholarly practice for those very students.

Speaking of inaccurate assertions, there is one quoted in the *C&RL* article from Texas A&M Press Director Charles Backus that needs to be addressed. Mr. Backus is quoted as saying that his press is in that small minority that is more reluctant to consider a revised ETD “because most libraries and library vendors will not buy or recommend purchase of ensuing books that are based substantially on them.” The authors of the article, themselves librarians, express surprise at this claim, and indicate that it needs further study. They want to know how widespread this belief is in the publishing community, but we should also be doing research into whether or not the assertion has any foundation in fact. Based on my experience, I do not believe that library selectors look at availability of an ETD when deciding whether or not to buy a monograph that is a revised dissertation; in fact, I doubt they usually know whether or not there even is such an ETD. One librarian told me that she looked for “quality, coverage, currency and authority” when buying monographs and the claim that she might not buy a book because an earlier version was available as an ETD was “poppycock.”

If sales of monographs based on dissertations have declined, and I am prepared to believe that is the case, the reasons should be sought elsewhere than with ETDs. This is really the other side of the publishers insistence that a dissertation must be substantially revised before it can be considered for publication. Just as presses need to appeal to a broader audience to support sufficient sales, so libraries are looking at books with broad relevance to the curriculum they support when they allocate their shrinking monographs budget (that is the “coverage” criteria). Even revised dissertations may be too focused on a specific niche, so they are quite likely to be the first things that get passed over. But it is not open access that is the problem; the problem is that we have less and less money to spend on books because an ever-increasing share of our collection budgets is going to journal packages. Your lunch, Mr. Backus, is being eaten by Elsevier and Wiley, not by ETDs.

Speaking of coverage and broad appeal gets me back to my suspicion that even the low numbers reported in this survey might over-report the degree to which ETDs inhibit publishing. The question that was posed in the survey reported in *C&RL* was specifically about attitudes toward manuscripts that are revised ETDs. But a larger question should be asked — are publishers accepting fewer revised dissertations overall, regardless of whether or not the original document is online. I suspect the answer is that they are accepting fewer dissertations overall, and that is the context in which we should place any discussion about fear of ETDs. In my own conversations with university presses, two criteria seem most important for them when deciding about any book manuscript — it must have “crossover” appeal, meaning that folks outside academia might want to buy it, and/or it must be suited for course adoption. For many small academic presses, I think, the days of the purely academic monograph that will be read only by specialists are largely over, and they are over because of economic realities (like shrinking library budgets for books) that are independent of the movement toward ETDs. It is this much more general set of conditions that spells bad news for revised dissertations.

Out of all of this, I hope for three next steps. First, I hope that the next survey about ETDs will look at how librarians are actually making purchasing decisions, and thus rid us of the claim that libraries are reducing monograph purchases based on the availability of ETDs. Second, broader research about the number of book manuscripts being accepted by academic press and the criteria that guide those decisions should be undertaken. And finally, I hope that the AHA will look at this issue more responsibly and issue a statement that is guided by real evidence rather than by fear and nostalgia.

# More on the AHA, ETDs and Libraries

Mon, 29 Jul 2013 07:06:16, ksmithl2@duke.edu, [category: libraries, category: scholarly-publishing, category: technologies]

I wanted to be done with the American Historical Association and their muddle-headed statement about embargoing theses and dissertations for up to six years from open access in order to protect publishing opportunities. I had hoped that the statement would receive the scorn that it deserves and we could all move on to discussing more serious matters. And it has received a good deal of that well-deserved incredulity and disparagement, but there is still a bit of a debate going on — evidenced by [this story in the New York Times](#) — so I want to make a couple of additional points.

First, there is an [article in Inside Higher Ed about the debate](#) that does a pretty good job of summarizing the discussion, although it still treats the AHA's statement with more seriousness than it deserves, in my opinion. But one really telling tidbit from that article is the comment by the director of the Association of American University Presses that its members, whose wishes are supposedly being catered to by the AHA, were surprised by the statement. Apparently he called over a dozen press directors after the statement was issued and found that none of them shared the concern that the AHA is so afraid of. So one wonders, as I did in my last post, where the evidence is for the claim the AHA is making that ETDs imperil publication.

The AHA attempts to address this very question in an [FAQ that was released shortly after the statement](#). There, AHA Vice-President Jacqueline Jones directly poses the issue of evidence, and answers like this:

This statement is based on direct communications between some AHA members and the acquisitions editors of several presses. In those communications, certain editors expressed the strong conviction that junior scholars placed their chances for a publishing contract at risk if their dissertations had been posted online for any length of time.

“Several presses” and “certain editors.” This reliance on vague rumors seem to contradict what the AAUP director says that he found by calling his colleagues. How are we to decide who is right with such unsupported statements? Does this reflect the standard of evidence that is acceptable to historians? Even worse is the fact that in the same answer, Ms. Jones disputes the much more quantified study recently published in *College and Research Libraries*, which also contradicts the AHA, by asserting that only a small number of presses said revised dissertations were “always welcome” while a much larger number said that such submissions were evaluated on a case-by-case basis. Ms. Jones suggests that the article authors take too much comfort in this portion of the responses they received to their survey. But this misunderstands what is being said; all publishers evaluate all submissions on a case-by-case basis. This is good news; it means your work will be considered (and, therefore, that the ETD was not a problem). What, after all, is the alternative? Even “always welcome” does not mean that all submitted dissertations will be guaranteed publication. Does the AHA hope to return to a dimly-remembered time when all dissertations from elite universities, at least, were published without question and without revision? If so, their rose-tinted nostalgia has lapsed into delusion, and the result is bad advice for graduate students. If, based on this commitment to a past that never existed, a student decides to avoid an online presence for her work for five or six years, her career will be destroyed in this age where if you cannot be found online you might as well not exist.

Throughout this debate, lots of folks are making assertions about libraries that display a lack of awareness of how those institutions work. Over and over again we hear that this fear of an online presence is because libraries will not buy monographs that are based on a revised dissertation if the unrevised version is available online. And no matter how often librarians remind folks that this is not true, it keeps resurfacing. Let me try again. In 25 years as an academic librarian, I have never met a librarian who looks for an online version of a dissertation before buying the published, and presumably heavily revised, monograph based on that dissertation. That is just not part of the process; most acquisitions librarians do not even know if there is an online version of the dissertation when they decide about purchasing the monograph; I certainly did not when I made these sorts of decisions. Libraries look for well-reviewed items that fit the curricular needs of their campus. They may ask if the book is over-priced and/or too narrowly focused, and those questions may rule out many revised dissertations these days. But they simply do not, based on my experience and discussions with many of my colleagues (more anecdotal evidence!), look to see if they can get an unrevised version for free. Perhaps librarians trust publishers to have guided the revision process well, creating thereby a better book, while the AHA does not seem to value that process.

Occasionally in this discussion we have seen publishers assert the same fiction about library acquisitions, sometimes dressed in more sophisticated form. They say that it is true that individual librarians do not make decisions based on OA ETDs, but that vendors like Yankee Book Peddler allow approval plan profiles to be designed so that revised dissertations are never considered. This is true, but it does not prove what it is asserted to prove. Many academic libraries, especially at smaller institutions that do not have a mandate to build a research collection, will exclude books based on revised dissertations from their approval plan because such books are likely to be very expensive and very narrowly focused. Many libraries simply cannot put their limited funds toward highly-specialized monographs that will not broadly support a teaching-focused mission. To try to use this situation to frighten people about open access is disingenuous and distracts us from the real economic tensions that are undermining the scholarly communications systems.

Finally, we should remember that dissertations have been available in pre-publication formats for a very long time. The AHA statement talks about bound volumes and inter-library loan, but that is either extreme nostalgia or willful ignorance. UMI/ProQuest has offered dissertations for sale since the 1970s, and has sold those works in online form for years before ETDs began to pick up momentum. And ETDs are not so new; early adopters began making electronic dissertations available a decade ago. Duke's own ETD program began in 2006, and we worked from the example of several predecessors. So why did the AHA wait until 2013 to issue its warning? Perhaps they took their own bad advice and nurtured their opinion until it suffered the same fate they are now urging on graduate students — irrelevance.

# Are we done with copyright?

*Fri, 09 Aug 2013 09:51:47, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: technologies]*

There has been lots of talk about copyright reform in Washington over the past few months, as evidenced by the [announcement from the Chair of the House Judiciary Committee](#) that that panel would undertake a comprehensive review of the copyright law. The first hearing for that review was held back in May. As [Mike Masnick from TechDirt noted](#), the Registrar of Copyrights is supportive of the effort but “still focused on bad ideas.” More recently, the Department of Commerce Task Force on Internet policy [issued a “Green Paper”](#) last month that helps us see what is right and what is wrong with the current attention in D.C. on copyright reform.

The Task Force recommended three broad categories of reform: updating the balance of rights and exceptions, better enforcement of rights on the Internet, and improving the Internet as a marketplace for IP through licensing. These last two are straight out of the legacy entertainment industries’ wish list, of course, and they would do nothing at all to better realize the fundamental purpose of copyright to promote creativity and innovation. As for the first, it all depends, of course, on where one thinks the balance has gone wrong. The Task Force includes as a priority the reform of the library exception in section 108, which is a favorite goal of the Copyright Office right now, but it is not at all likely that anything the Office cooks up would be better than leaving the current 108 alone. The Green Paper also seeks “input” about digital first sale and remixes; note that input is a much weaker commitment than the task Force is willing to make to such things as online enforcement, reform of 108, or — another industry favorite — the extension of the public performance right for sound recordings.

Most of this is just patching the current law around the edges, and addressing only those problems that the industry lobbyists would like to see fixed. But it provides a context for asking a much more searching question about the utility of copyright in a digital age. Does copyright actually serve its purpose, or any socially desirable purpose, in the current economic and technological environment? What would it look like if we reformed the law in a way that paid close attention to that environment, rather than just listening to lobbyists for industries that are failing to adapt and want the law to protect them?

Let’s start with [this report from The Atlantic](#) about research into the effect of copyright protection on the availability of books. This should be the “sweet spot” for copyright; if it does anything right, it should encourage the creation and distribution of books. But the research reported in the article suggests just the opposite, that copyright protection, especially protection that lasts as long as it now does, actually depresses availability, so that more books are available from the decades just outside of copyright than from the most recent years. Here is the conclusion of the researcher, a professor at the University of Illinois:

Copyright correlates significantly with the disappearance of works rather than with their availability. Shortly after works are created and proprietized, they tend to disappear from public view only to reappear in significantly increased numbers when they fall into the public domain and lose their owners.

This is not really that surprising if we think about what happens in modern book publishing. A title is published and sold for 3-5 years, at most. Then other titles come along and push the “older” ones “off the shelf.” The initial publisher no longer is interested in marketing the vast majority of these books

that are 10 or 20 years old, and, because of copyright, no one else can do so. So a vast black hole swallows up most of the works of our culture that are less than 95 years old. Only as they reach the century mark do these works begin to reappear as reprints, because other publishers, and even members of the general public, can now reproduce and distribute them.

By the way, one of the ironies of this article, which helps to define and quantify what is widely known as the “orphan works problem,” is that many of the books that are unavailable actually may be in the public domain. Because for much of the 20th century copyright had to be renewed after 28 years and most rights were not renewed (due to the same lack of interest by their publishers that sent them to the remainder table) many of these books could be reprinted, but the Byzantine tangle of rules and Copyright Office record makes it too risky for anyone to undertake the task.

As I say, this situation is not a surprise. Back in 1970, then Harvard Law professor and now Associate Justice of the Supreme Court Stephen Breyer wrote about “[The Uneasy Case for Copyright](#)” (the link is to the article in JSTOR) in which he argued that copyright was not fulfilling its purpose very well and probably should not be dramatically expanded in the then-nearly-completed copyright revision process. Unfortunately Breyer’s article had little impact on that process, which resulted in the 1976 Copyright Act, but the past forty years have proven that he was largely correct and the *Atlantic* article discussed above is just one of many pieces of evidence. But “the real force of Breyer’s article is in arguing that copyright must be justified in a particular economic context and that technological changes may modify economic conditions.”

This quote about Breyer’s “Uneasy Case” comes from a 2011 article by another law professor, Niva Elkin-Koren of the University of Haifa, called “[The Changing Nature of Books and the Uneasy Case for Copyright](#).” In her article, Professor Elkin-Koren carefully examines the technological changes and lays out the subsequent economic analysis, just as Breyer did back in 1970, for the eBook age. If in Breyer’s day the case for copyright was “uneasy,” then in the digital age it is downright painful. Were I to summarize Elkin-Koren’s conclusions in a single sentence, it would be this — what we need most in the digital environment is competition, and copyright in its current form suppresses competition. The digital environment is fundamentally different than print, largely due to the lower barriers to entry into the publication market. In this context, competition can be vital and beneficial, but the copyright monopoly threatens to help established players gain an even tighter stranglehold on the marketplace than was possible in the print era (and that grip was already too tight, as we have seen). Placing Elkin-Koren’s work next to Breyer’s, it is plain to see that the harmful economic and cultural effects of our current copyright regime are more visible and more harmful than ever.

If copyright reform were undertaken in the context of this awareness, what would it look like? Suppose we were willing to do more than simply rearrange the deck chairs, where might we end up? Elkin-Koren suggests a possibility:

[A] legal right to control copies may no longer be useful in a digital environment. One reason for the weakening strength of copyright is that the legal right against unauthorized copying is no longer effective in digital markets... In order to secure the rights of authors to a share in the commercial revenues extracted from their books it may suffice to simply define a legal right to receive compensation: a fixed share from any commercial use.

It is breathtaking to consider the consequences of this kind of lightweight approach to copyright, as opposed to the steady process of adding more and more restrictions and penalties that has

characterized nearly all previous copyright legislation. Harkening back to the first U.S. copyright law, perhaps a “right to vend” is all that we really need in the Internet era. Certainly this would bring competition into the digital marketplace for copyrighted goods, which would scare the entertainment industry to death! It is a fantasy, I know, but I would love to see copyright reform discussions in Washington start from that simple baseline, and then have an open discussion (one not dominated by those lobbyists best known to legislators and bureaucrats) about the consequences, problems and additions, if any, that would be needed to make that simple proposal work.



# Feelin' stronger every day

*Mon, 19 Aug 2013 17:54:26, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries, category: scholarly-publishing]*

I don't mean this to sound vindictive or smug, but the publisher John Wiley keeps filing, and losing, lawsuits intended to enforce ever-stronger copyright claims, that, in the outcome, can only be encouraging to those of us who seek a more balanced law that both protects copyright holders and supports reuse rights.

Wiley was the plaintiff in the case recently decided by the U.S. Supreme Court that held that the doctrine of first sale applied, in the U.S., to any lawfully made work, regardless of the place of manufacture. Wiley, of course, wanted the Court to limit first sale to works manufactured in the U.S. so it could choke off second-hand sales, at least for textbooks, but instead clarified the law in exactly the opposite direction. And then, in another set of cases, Wiley, joined by the American Institute of Physics, filed three different lawsuits, in different jurisdictions, alleging that law firms that filed copies of scholarly articles as disclosures of "prior art" with patent applications were infringing copyright if they did not pay for licenses for each article. The two losses they have recorded thus far in those cases are more evidence of the robust notion of fair use our courts are developing for the digital age.

In one of those lost cases, in Northern District of Texas, the judge dismissed the case on summary judgment back in May, holding that fair use protected the challenged copying and distribution. But that decision was announced from the bench, and as far as I know we do not have a written opinion yet that we can parse to see how it might apply in other situations.

Late last month, however, the other court in which such a lawsuit was filed did issue an opinion. Actually, a magistrate judge assigned to consider the case by the federal district court in Minnesota [issued a "report and recommendation" that strongly supports fair use for the situation in question](#). It also offers an analysis that could easily provide an analogy to activities in higher education, including the e-reserves system that is being challenged in the Georgia State University lawsuit.

It is worth spending some time looking at the report and recommendation of the Minnesota magistrate. His basic recommendation is that the suit be dismissed on summary judgment because the challenged use of copyrighted articles is fair use. Apparently because of the North Texas case, Wiley had pared back its claims, allowing that the actual filing of articles with a patent application, and a single copy retained by the law firm in its case file, was fair use. But if Wiley thought that this common sense concession would allow it to force firms that did more, such as maintaining a database of articles for its attorneys or sending copies of articles to clients, to pay licensing fees, it was badly mistaken. The Magistrate Judge's recommendation is a sweeping assertion of fair use, and there are four aspects of his analysis that I want to highlight.

First, and perhaps most importantly, Judge Keyes asserts that the use made by Schwegman, Lundberg & Woessner, the law firm that was sued, is transformative. He finds transformation in the use of the articles in question for a different "intrinsic purpose" than that for which they were published: This conclusion does not change merely because the "copying" Schwegman engaged in did not alter the content of the Articles. That lack of alteration may make the label "transformative use" a messy fit... But reproduction of an original without any change can still qualify as fair use when the use's purpose and character differs from the object of the original, such as photocopying for use in a classroom.

In reaching this decision that Schwegman's purpose in using these articles, which was to comply with government requirements, to compare the invention to "prior art," and to represent its' clients interests, "did not supersede the intrinsic purpose of the original," the Judge also stated a case for why the copying at issue in the Georgia State e-reserves case can similarly be viewed as transformative. Indeed, he made that point explicit, since teaching is a different "intrinsic purpose" than that for which they were written and published, which the judge said was to inform the scientific community of new research and allow for the testing of methods and conclusions.

Next, the Magistrate Judge directly refuted the claim by the two publishers that the *Texaco* case, which refused to allow fair use for copying within the research arm of a commercial company, should also be applied to reject fair use for this law firm (which is, of course, a commercial entity). Here again the Judge made a careful distinction between the purpose that was rejected in *Texaco* and the purpose for which Schwegman was making its copies:

Here, there is no evidence that would allow a reasonable jury to conclude that Schwegman is similarly [to *Texaco*] maintaining mini-research libraries so that it can avoid paying for separate licenses for each of its lawyers, thereby superseding the original purpose of the Articles... the evidentiary character of Schwegman's copying differentiates the firm's use of the Articles from the Articles' original purpose.

At this point as well as others, this recommendation undermines a central claim of the publishers in the Georgia State case. Just because a licensing market exists, and the use to which the excerpts from published works are put therefore saves the users some money, that does not undermine fair use, Judge Keyes tells us, when the purpose of the use is intrinsically different from the original purpose. If the Eleventh Circuit Court of Appeals applies this type of reasoning in the GSU appeal, we could see an even broader fair use ruling in Georgia State's favor than we got from the District Court. No guarantees, of course, that the Eleventh Circuit will take this approach, but this analysis in the Schwegman case is one more support for that possibility.

Several times in his report, Judge Keyes points out that the loss of licensing fees would have no impact at all on the incentives that scholarly authors have to write the articles that are at issue in the case. This incentive-based approach is the right one to take, in my opinion, since it looks at exactly the question copyright law should be focused on — what is needed to ensure the optimal level of ongoing creation and innovation. Since scholars do not get paid for their scholarly articles, and any small amounts that may trickle down to them from licensing fees are irrelevant to the decision to report on their work, the Judge says that the fact that "the Publishers may have lost licensing revenue from Schwegman's copying is not determinative and *does not create a fact issue for trial.*" I have italicized the last part of this sentence to emphasize that Judge Keyes does not think this is a hard case or a compelling argument, since the standard he is applying, in recommending summary judgment, is whether any reasonable jury could find otherwise. He believes they could not, given the facts that surround scholarly communications today.

Finally, there is a fascinating part of this recommendation that points out, I think, what good citizens libraries really are in the copyright realm. The law firm, you see, could not account for where it obtained the original copy of some of these articles, so the publishers argued that this lack of an authorized or licensed original should defeat fair use, alleging "bad faith" and citing the *Harper & Row* case. But without evidence of actual piracy, the Judge rejects this claim and holds that no reasonable jury could find that there was bad faith by Schwegman that would prevent a holding of fair use. I find this important because most academic libraries either do own purchased copies of the books they excerpt

for e-reserves or make every attempt to obtain them if a request is made for a book the library does not already own. I am frequently asked by librarians how hard they should search for a copy to purchase. I believe this is a good practice, for both copyright and pedagogical reasons, but the *Schwegman* case is a reminder that by doing this we may be going beyond the absolute requirements of a fair use argument. The fact is that, in spite of some over-heated rhetoric from the publishing industry (a former president of the AAP once called all librarians pirates), libraries try hard to be good citizen and to respect the appropriate boundaries of copyright. What is causing problems these days is the publishers' deep fear of the digital environment and their efforts, in response to that fear, to push the boundaries of copyright further and further, even to the point that it's justifying purpose of supporting authorship and innovation is undermined.

The *Schwegman* report is just that, a report and recommendation. It remains to be seen if the District Court judge responsible for the case will adopt it or not. But the fact that it is out there, and is so supportive of a fair use argument that would allow and endorse library practices that the publishing industry has challenged, is another data point for our consideration. It serves as a reminder that the key to finding favor in the fair use analysis is to be doing something the court believes is important and beneficial. When we make limited copies to teach our students and support our researchers, we are on the side of the angels, and we continue to get these examples that must, over time, accumulate into a body of support for library practices. It is the publishers like Wiley, who are in the position of asking courts to stretch copyright law solely to support new income streams, that are and will continue to be, in spite of their offensive strategies, always on the defensive.

# Copyright policy here and abroad

*Thu, 29 Aug 2013 06:54:46, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: international-ip, category: scholarly-publishing]*

Earlier this month, Jonathon Band, who, among his other accomplishments, is the principle attorney for the U.S. Library Copyright Alliance, posted a [report of a talk he gave in Seoul, South Korea at a conference on “The Creative Economy and Intellectual Property.”](#) In response to an invitation to talk about how U.S. copyright policy helped to foster a creative economy, Band made an interesting distinction, one that caught my attention and made me nod my head in surprised agreement.

Band’s basic distinction is this: U.S. domestic policy does help to foster a creative economy because it seeks to balance copyright protections, which do support creative pursuits, with exceptions that limit the scope of claims to copyright infringement. These exceptions are every bit as to encourage innovation as the protections themselves are, but U.S. policy about copyright in other countries does not similarly support a creative economy.

We can identify two reasons why the U.S approach to copyright in other countries does not support creativity and innovation, based on a distinction Band makes between process and substance.

In terms of process, the U.S. foreign policy about copyright is entirely in the hands of the Executive branch of government, which is very susceptible to lobbying from the traditional content industries. The important role that the entertainment industries play in any Presidential election is just one reason for this understandable, if unfortunate, influence on the Executive branch. And because that branch is solely responsible for our foreign relations, we are often in the position, as Band illustrates nicely, of advocating for much stricter copyright provisions abroad than we have, or are allowed to have, at home.

Part of the reason our domestic law is more balanced is because of the role of the courts, who are much less easily influenced by lobbying and who have a great role in maintaining the copyright balance, as we have seen in the important string of fair use decisions that have been coming out of courts all over the country in recent years. But U.S. courts have no role in shaping the kinds of policies we advocate for in other nations.

On the side of substance, our copyright policy toward other countries is determined and expressed by trade representatives, whose goal, naturally, is to improve the market for U.S. products around the world. Thus their copyright focus is on (primarily) entertainment products that already exist, and which, they believe, must be strictly protected from all kinds of unauthorized use, even if those uses would be allowed in the U.S. So at the same time that U.S. courts are developing a broad view of fair use that supports digital innovation and new industries, our trade reps are vigorously campaigning to prevent any other nation from getting the (correct) idea that fair use is a good idea if you want to support a creative economy.

To continue this distinction a little farther, I want to look at two other items that came to my attention this week.

On the domestic front, there is [this info-graphic about fair use](#) from the Association of Research Libraries, which is a great resource for starting a conversation with academic librarians and faculty members about the space that our domestic courts are opening for innovation, scholarship and creativity with their expanding approach to fair use. Conveying to our communities that fair use is good

news from the copyright front, and that considered, responsible decisions about how to use materials in teaching and scholarship are also quite likely to be good decisions about fair use, is an important role on campus.

On the international side, consider this [press release from the European Commission suggesting that open access has reached a “tipping point” in Europe](#). The European Community, of course, has been a leader in promoting open access to research and scholarship. And it is helpful to see open access as a way to simply move past the pressure that the EC and other nations receive from the U.S. to strengthen copyright protections and weaken user rights. Open access is a way for copyright holders — remember that in spite of the rhetoric, it is authors on our campuses who are the original copyright holders in virtually all works of scholarship — to exercise their rights in ways that are most beneficial to them and to avoid many of the restrictions imposed by secondary copyright holders on access and reuse. It allows scholars to simply ignore the attempts by industry and the U.S trade reps to ratchet copyright protections ever higher and to use their own copyrights in a way that is true to copyright’s core purposes of supporting creativity and innovation. Indeed, by making our works of scholarship openly accessible, we provide much needed access to scholars and others, especially in the developing world, access that will be denied if those users have to rely on national policies that are shaped by pressure from the U.S.

In different ways, both the growing consensus around fair use and the open access movement are responses to the issues that Jon Band raised in his talk. Both are supports for a creative economy. But it is open access, where authors hold on to their copyrights in order to use their works for the best interests of themselves, their discipline and scholarship in general, that has the most potential to foster growth and innovation both here and abroad.

# Public art and fair use

*Mon, 09 Sep 2013 11:09:29, ksmithl2@duke.edu, [category: notes, category: fair-use, category: scholarly-publishing]*

A couple of weeks ago I was asked a question that set me thinking and required a bit of research. That is hardly post-worthy, but when a case came down that addressed the same issue I had been thinking about, it suddenly seemed worth discussing. It provides an opportunity to dissect an issue, remind ourselves of things we already know, and also explore the continuing evolution of fair use decisions from our courts.

The question involved the use, in a planned publication, of a photograph of a piece of public art. In Durham we have several murals, painted on walls in public spaces, of Pauli Murray, one of our prominent citizens. Rev. Murray was a civil rights activist, a women's rights activist, and the first African-American woman ordained as a priest in the U.S. Episcopal Church. But could an author use a photograph of one of those murals in an upcoming article?

Of course, the first thing that comes to mind is that there are likely two sets of rights to be aware of here — the artist's and the photographers. In this case, however, the photo was taken by the author of the publication that was in preparation, so the issue was focused on the scope of the artist's rights.

Does it matter that this work of art can be seen by people walking on a public sidewalk or through a public park? I knew, for example, that that fact *did* matter when the subject of the photography was a building. In 1990 Congress added [section 120](#) to our copyright law which permits "pictorial representations" of an "architectural work that has been constructed" as long as the building in question is "ordinarily visible from a public place." These pictures can be made, distributed and publicly displayed without the need to obtain permission. But a quick look at section 120 reminded me that it is quite specific to architectural works; it does not tell us anything about the situation for a work of visual art that is painted on to the side of such a building or otherwise placed in a public spot.

Next up in my mental queue was an older case (with the great name of [Letter Edged in Black Press v. Public Building Commission of Chicago](#)) that involved the immense, untitled Picasso sculpture that is installed on the Civic Center Plaza in Chicago. But interesting as that case is, it is not applicable to the situation I was looking into. The case was decided in 1970, so it was based on the provisions of our older, 1909 copyright law. In the specific circumstances, a federal court held that the Picasso sculpture was in the public domain because all of the publicity around it had amounted to "publication" without copyright notice. Under the 1909 law this put the work in the public domain. But that is no longer the case under the newer Copyright Act, which replaced the 1909 law on January 1, 1978. So the "Chicago Picasso" case did not answer my question either.

Ultimately, the answer comes down to this — copyright is automatic when the work of art is "fixed", including by being painted on a wall, so the artist holds a copyright in this mural. Simply painting it in a public place does not make it public domain or give people any license to make use of it (other than by viewing it, of course). There is no specific exception that would apply to use of a photograph of this type of art. When we have exhausted those options — public domain, a license, or a specific exception — we are left with two more possible grounds for using a work, fair use or permission from the rights holder.

Which gets me to the recent case, which actually involved very similar circumstances — reuse of an image of an artwork painted on a publicly visible wall. In this case, the artist was Derek Seltzer and a

copy of his poster called “Scream Icon” was on a wall in Los Angeles that was part of a video used as backdrop for live concerts by the band Green Day. In an opinion last month, which can be [found here](#), the Ninth Circuit Court of Appeals affirmed a lower court ruling that this use of the poster was fair use. The Ninth Circuit panel found that Green Day’s use of the image, which was in a context created by other posters and graffiti on the wall and was used to convey, the Court said, a very different (and much clearer) message than the original poster, was transformative:

[the] video backdrop using ‘Scream Icon’ conveys new information, new aesthetics, new insights and understandings that are plainly distinct from those of the original piece.

The Court went on to hold that the creative nature of the work weighed slightly against fair use, and that the use of the entire poster was neutral, since the poster could not be separated from its context on the wall. Finally, they ruled that there was no impact on the potential market for or value of the poster caused by Green Day’s fleeting use of it in a video backdrop. They also held that that use was only “fleeting commercial” because the video (and the poster) was not used in any way to market Green Day’s concert tour.

It is interesting that the Ninth Circuit panel said that this was a close case (and reversed a grant of attorney’s fees to Green Day because of that). In many ways it seems like a pretty clear case of transformative fair use, and one for which there is precedent. In the Second Circuit a very similar case involving use of copyrighted visual material during a live performance was decided about six months ago, also in favor of transformative fair use. The case was called [SOFA Entertainment v. Dodger Productions](#) and involved a seven second video clip from the Ed Sullivan Show shown on a screen at the end of the first act of the Broadway show *Jersey Boys*. The Ninth Circuit cited *SOFA Entertainment*, but seemed to feel that the case for transformative fair use regarding the poster was closer. On the one hand, of course, the use is much more ephemeral, but perhaps the *Seltzer* court felt that the “biographical anchor” which the SOFA court found in the use of Ed Sullivan in a show about the Four Seasons was lacking for Green Day. And maybe they just wanted to reverse the grant of attorney’s fees to the band, feeling that it was unfair to Mr. Seltzer.

All of this reminds us that the analysis of transformative fair use, while very useful for both creative artists and scholars, is evolving territory. In fact, the Ninth Circuit panel noted this themselves when considering the issue of attorney’s fees, but also saw in this case a convergence between themselves and the Second Circuit on the other coast. Fair use is always extremely dependent on the specific facts and circumstances related to the particular use of particular material. Reading these case decisions continues to give us additional data points to guide our analysis, but we never arrive at a finished picture.

So what about the photograph of that Pauli Murray mural in a scholarly article? If we look at the fair use argument as it is developed in these cases and many others — especially the language quoted above about new meanings and new insights — the use of that photo is probably fair use. But there was also some *realpolitik* in my answer to the inquiry. The artist who painted those murals is known, still working, and easy to contact. Scholars working on the life and impact of Pauli Murray may want to make later uses of these works dedicated to her. So why not ask? Especially because this is a clearly non-profit, scholarly use that will, like the murals, honor the memory of a remarkable women, the artist has every reason to grant permission. Asking permission, we know, does not prevent a later reliance on fair use, but in some cases it seems like an easy and respectful way to proceed even when fair use would likely also support the use.

# An odd announcement

*Fri, 20 Sep 2013 08:11:30, ksmithl2@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies]*

I did not initially pay much attention when publisher John Wiley [announced early in September](#) that they would impose download limits on users of their database “effective immediately.” My first thought was “if they are going to disable the database, I wonder how much the price will decrease.” Then I smiled to myself, because this was a pure flight of fantasy. Like other publishers before it, Wiley, out of fear and confusion about the Internet, will reduce the functionality of its database in order to stop “piracy,” but the changes will likely do nothing to actually address the piracy problem and will simply make the product less useful to legitimate customers. But it is foolish to imagine that, by way of apology for this act, Wiley will reduce the price of the database. As contracts for the database come up for renewal, in fact, I will bet that the usual 6-9% price *increase* will be demanded, in fact, and maybe even more.

As the discussion of this plan unfolded, I got more interested, mostly because Wiley was doing such a bad job of explaining it to customers. More about that in a moment. But first it is worth asking the serious question of whether or not the plan — a hard limit on downloads of 100 articles within a “rolling” 24 hour period — will actually impact researchers. I suspect that it will, at least at institutions like mine with a significant number of doctoral students. Students who do intensive research, including those writing doctoral dissertations as well as students or post-docs working in research labs, sometimes choose to “binge” on research, dedicating a day or more to gathering all of the relevant literature on a topic. Sometimes this material will be download so that it can be reviewed for relevance to the project at hand, and a significant amount of it will be discarded after that review. Nothing in this practice is a threat to Wiley’s “weaken[ed]” business, nor is it outside of the bounds of the expected use of research databases. But Wiley has decided, unilaterally, to make such intensive research more difficult. In my opinion, this is a significant loss of functionality in their product — it becomes less useful for our legitimate users — which is why I wondered about a decrease in the price.

The text of the announcement was strangely written, in my opinion. For one thing, I immediately distrust something that begins “As you are aware,” since it usually means that someone is about to assert categorically something that is highly dubious, and they do not wish to have to defend that assertion. So it is here, where we are told that we are aware of the growing threat to Wiley’s intellectual property by people seeking free access. I am very much aware that Duke pays a lot for the access that our researchers have to the Wiley databases, so this growing threat is purely notional to me. As is so common for the legacy content industries, their “solutions” to piracy are often directed at the wrong target. So it is with this one. As a commenter on the LibLicense list [pointed out](#), Wiley should be addressing automated downloads done by bots, not the varied and quite human research techniques of its registered users.

Another oddity was the second paragraph of the original announcement, which seems to apologize for taking this action “on our own,” without support from the “industry groups” in which Wiley is, they say, a “key player.” As a customer, I am not sure why I should care about whether the resource I have purchased is broken in concert with other vendors or just by one “key player.” But the fact that Wiley thought it needed to add this apology may indicate that it is aware that it is following a practice that has been largely shown throughout the content industry to be ineffective against piracy and alienating to genuine customers. Perhaps, to look on the bright side, it means that other academic article vendors will not follow Wiley’s lead on this.



Things got even stranger when [Wiley issued a “clarification”](#) that finally addressed, after a 10 day delay, a question posed almost as soon as the first announcement was made, which was about exactly who would be affected by the limitation. That delay, in fact, made me wonder if Wiley had not actually fully decided on the nature of the limitation at the time of the first announcement, and waited until a decision was made, belatedly, to answer the question. In any case, the answer was that the limitation would only be imposed on “registered users.” That clarification said users who accessed the database through IP recognition or via a proxy would not be affected, and that these non-registered users made up over 95% of the database usage. So as Wiley asserts that this change will make little difference, they also raise the question of why do it at all. It seems counter-intuitive that registered users would raise the biggest threat of piracy, and no evidence of that is offered. And I wonder (I really do not know) why some users register while most, apparently, do not. If Wiley offers registration as an option, they must think it is beneficial. But by the structure of this new limitation, they create a strong incentive for users not to register. But then Wiley adds a threat — they will continue to look for other, presumably more potent, ways to prevent “systematic downloads.” So our most intensive researchers are not out of the woods yet; Wiley may take further action to make the database even less usable.

All of this made me doubt that this change had really been carefully thought out. And it also reminded me that the best weapon against unilateral decisions that harm scholarship and research is to stop giving away the IP created by our faculty members to vendors who deal with it in costly and irresponsible ways. One of the most disturbing things about the original announcement is Wiley’s reference to “publishers’ IP.” Wiley, of course, created almost none of the content they sell; they own that IP only because it has been transferred to them. If we could put an end to that uneven and unnecessary giveaway, this constant game of paying more for less would have to stop. So I decided to write a message back to Wiley, modeled on their announcement and expressive of the sentiment behind the growing number of open access policies at colleges and universities. Here is how it will begin:

As you are aware, the products of scholarship, created on our campuses and at our expense, are threatened by a growing number of deliberate attempts to restrict access only to those who pay exorbitant rates. These actors weaken our ability to support the scholarly enterprise by insisting copyright be transferred to them so that they can lock up this valuable resource for their own profit, without returning any of that profit to the creators. This takes place every day, in all parts of the world.

University-based scholarship is a key player in the push for economic growth and human progress. While we strive to remain friendly to all channels for disseminating research, we have to take appropriate actions on our own to insure that our IP assets have the greatest possible impact. Therefore, effective immediately, we will limit the rights that we are willing to transfer to you in the scholarly products produced on our campuses.

# The varieties of the public domain

Fri, 27 Sep 2013 06:51:40, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: public-domain]

It is well known that early publishing houses in America built themselves up, in large part, through the publication of unauthorized editions of popular British authors. This was a time when foreign works, including English-language books published in Britain, did not enjoy copyright protection in the U.S. Indeed, books published abroad in English did not get copyright in this country until 1891, a full century after the first U.S. copyright law. And even after that time, the strict formalities imposed on foreign works, including the infamous “manufacturing clause,” kept many works out of copyright. American publishers used this legal situation to make money off of the popularity of British authors without having to pay any royalties to those authors. The firm Harper published unauthorized editions of Walter Scott, for instance, while Grossett & Dunlap (now part of Penguin) built its business in part by publishing Rudyard Kipling without his permission. British authors and British publishers called this activity “piracy,” but in the U.S. there was a different name for it. It was the public domain.

In his new book *Without Copyrights: Piracy, Publishing and the Public Domain* (Oxford University Press, 2013), law professor (and one-time professor of English Literature) Robert Spoo details the legal and the literary situation that modernist British authors faced because of the narrowness of American copyright or, alternately, the expansiveness of the American public domain. Just to take one example, Virginia Woolf’s early novels were published in the U.S. with substantial changes from their U.K. editions, because it was believed that revised American editions could get U.S. copyright even if the original edition had failed to meet the manufacturing requirements. Woolf instructed her friend Lytton Strachey, for example, to make lots of revisions because her American publisher suggested “the more alterations the better — because of copyright” (Spoo, p. 95). Joyce and Pound were both published in fragmentary format in magazines because of the (unproven) theory that such publication could stake out a copyright claim while avoiding the difficulties and expense of U.S. printing and binding. It is fascinating, in my opinion, to see how the actual experience of literature was shaped for American readers by the strictures of the copyright law.

Whether because copyright for foreign works was simply unavailable (as it was prior to 1891) or because of the rule that English-language works by foreign nationals had to be typeset, printed and bound in the U.S. in order to enjoy copyright here (not fully repealed until 1986), lots of well-known works were in the American public domain in those days. And in spite of the frequent resort to the word piracy, this was a perfectly legal situation, created intentionally to protect American publishers and printers. As nineteenth-century copyright scholar Eaton Drone wrote:

[I]t is not piracy to take without authority either a part or the whole of what another has written, if neither a statute nor the common law is thereby violated... Hence, there may be an unauthorized appropriation of literary property which is neither piracy nor plagiarism, as the republication in the United States of the work of a foreign author. This is not piracy, because no law is violated; and, without misrepresentation as to authorship, it is not plagiarism. (Quote by Spoo, p. 23)

Then, as now, accusations of piracy were thrown about rather irresponsibly, and Drone sought to clarify the situation.

Over time, publishers developed a system called “courtesy of the trade” which took the place of copyright protection for foreign authors. That system had two prongs — the offer of some form of payment to the foreign author of a reprinted work and a “gentleman’s agreement” amongst U.S. publishers that others would not “jump the claim” of a publisher who had announced the intention to reprint a specific author. Although this was referred to as courtesy, it was really sharp business tactics, and it was not particularly fair to the authors. They were not in a strong negotiating position as to the fees they were paid; they pretty much had to “take it or leave it,” especially since the system made it very difficult to shop their work to multiple American publishers. And, of course, the system was used to create informal monopolies, which excluded competition and drove up prices. In some ways the system of trade courtesy reminds me of the current situation for academic publishing. Although lip-service is paid to the rights of scholarly authors by publishers, their work is appropriated without payment through a coercive system in which they had little option, until recently. Such publication is not piracy, as Drone tells us, but it certainly is a form of free-riding, coupled with an effective monopoly that keeps prices on the sales side artificially high.

The public domain, of course, is no longer the wide open commons described by Spoo, where most works published abroad were free for anyone to reprint or otherwise use within 90 days of publication unless the authors met onerous requirements. Today our public domain is almost as constrained as it was free-wheeling for much of our history. Today, virtually no published works are entering the U.S. public domain; our cultural heritage is basically locked up. And figuring out what is and is not in the American public domain is just as difficult today as it was for Ezra Pound or Charles Dickens. As Spoo writes about contemporary international copyright law,

Far from unifying the global public domain, however, recent laws enacted in the United States and Europe only guarantee its continuing disharmony and fragmentation. Worldwide availability of modernist works is threatened by a tragedy of the uncoordinated global commons, a congestion of divergent durational terms and other rules that impede the free use of works created nearly a century ago. (p. 8)

In the context of this confusion, it is all the more laudable that some groups are making continuing contributions to the public domain. I began reading Spoo’s book shortly after returning from a meeting about the Copyright Research Management System that is an ongoing project of the HathiTrust. CRMS is methodically researching books that fall into the “doubtful” categories of U.S. copyright — periods of years during which a published work might still be protected or might be in the public domain. Since the beginning of the U.S. project in 2008, nearly 150,000 titles have been identified as public domain. These are works that can be made available to the public without any harm to rights holders.

There is nothing underhanded about this project, as there arguably was about unauthorized reprinting by American publishers of unprotected foreign works. Instead, this research provides a pure benefit. Most of that benefit is in the ability to open up new works to the public that were previously closed simply due to lack of data. Another part of the benefit, however, is in the fact that information is being gathered that is beneficial to rights holders and to future users. As it determines that many books are in the public domain, the CRMS project has also determined that a significant number of the books it has researched are still in copyright, which is important information to know. Even the fairly large category of “undetermined” is beneficial. Although these books are not able to be opened to the public domain, there is now better data about these titles and the gaps in our knowledge about them have been identified. Knowing what we don’t know, to paraphrase Don Rumsfeld, is itself a step forward. HathiTrust should be proud of the work that it has done and continues to do, opening books to the public domain and gathering data that will clarify the contours of the public domain into the future.

The public domain is a changeable space, as Robert Spoo shows eloquently in *Without Copyrights*. Changes in law, changes in the practices of authorship and publishing and even the cost of paper can influence what is, or is not a public domain resource. As with the weather, many people complain about the vagaries of the public domain, but do nothing about them. Spoo and the HathiTrust are each, in very different ways, doing something to strengthen our notions about those resources that are the vital common property of us all.

# Can we “fix” open access?

*Mon, 07 Oct 2013 15:12:17, ksmithl2@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The later part of this past week was dominated, for me, by discussions of the [article published in \*Science\*](#) about a “sting” operation directed against a small subset of open access journals that purports to show that peer-review is sometimes not carried out very well, or not at all. Different versions of a “fake” article, which the authors tell us could easily be determined to be poor science, were sent to a lot of different OA journals, and it was accepted by a large number of them. This has set off lots of smug satisfaction amongst those who fear open access — I have to suspect that the editors of *Science* fall into that category — and quite a bit of hand-wring amongst those, like myself, who support open access and see it as a way forward out of the impasse that is the current scholarly communications system. In short, everyone is playing their assigned parts.

I do not have much to say in regard to the *Science* article itself that has not been said already, and better, in blog posts by [Michael Eisen](#), [Peter Suber](#) and [Heather Joseph](#). But by way of summary, let me quote here a message I posted on an e-mail list the other day.

My intention is not so much to minimize the problem of peer-review and open access fees as it is to arrive at a fair and accurate assessment of it. As a step toward that goal, I do not think the *Science* article is very helpful, owing to two major problems.

First, it lacked any control, which is fundamental for any objective study. Because the phony articles were only sent to open access journals, we simply do not know if they would have been “caught” more often in the peer-review process of any subscription journals. There have been several such experiments with traditional journals that have exposed similar problems. With this study, however, we have nothing to compare the results to. In my opinion, there is a significant problem with the peer-review system as a whole; it is over-loaded, it tends toward bias, and, because to is pure cost for publishers, no one has much incentive to make it better. By looking only at a sliver of the publishing system, this *Science* “sting” limited its ability to expose the roots of the problem.

The other flaw in the current study is that it selected journals from two sources, one of which was Jeffrey Beall’s list of “predatory” journals. By starting with journals that had already been identified as problematic, it pre-judged its results. It was weighted, in short, to find problems, not to evaluate the landscape fairly. Also, it only looked at OA journals that charge open access article processing fees. Since the majority of OA journals do not charge such fees, it does not even evaluate the full OA landscape. Again, it focused its attention in a way most likely to reveal problems. But the environment for OA scholarship is much more diverse than this study suggests.

The internet has clearly lowered the economic barriers for entering publishing. In the long run, that is a great thing. But we are navigating a transition right now. “Back in the day” there were still predatory publishing practices, such as huge price increases without warning and repackaging older material to try and sell it twice to the same customer, for example. Librarians have become adept at identifying and avoiding these practices, to a degree, at least. In the new environment, we need to assist our faculty in doing the same work to evaluate potential publication venues, and also recognize that they sometimes have their own reasons for selecting a journal, whether toll-access or open, that defy our criteria. I have twice declined to underwrite OA fees for our faculty because the journals seemed suspect, and both time the authors thanked me for my concern and explained reasons why they wanted to publish there

anyhow. This is equally true in the traditional and the OA environment. So assertions that a particular journal is “bad” or should never be used needs to be qualified with some humility.

At least one participant on the list to which I sent this message was not satisfied, however, and has pressed for an answer to the question of what we, as librarians, should do about the problem that the *Science* article raises, whether it is confined to open access or a much broader issue.

By way of an answer, I want to recall a quote (which paraphrases earlier versions) from a [2007 paper for CLIR by Andrew Dillon of the University of Texas](#) — “The best way to predict the future is to help design it.” Likewise, the best way to avoid a future that looks unpleasant or difficult is to take a role in designing a better one.

That the future belongs to open access is no longer really a question, but questions do remain. Will open access be in the hands of trustworthy scholarly organizations? Will authors be able to have confidence on the quality of the review and publication processes that they encounter? Will open access publishing be dominated by commercial interest how will undermine its potential to improve the economics of scholarly communications? If libraries are concerned about these questions, the solution is to become more involved in open access publishing themselves. If the economic barriers for entering publisher have been lowered by new technologies, libraries have a great opportunity to ensure the continuing, and improving, quality of scholarly publishing by taking on new roles in that enterprise.

Many libraries are becoming publishers. They are publishing theses and dissertations in institutional repositories. They are digitizing unique collections and making them available online. They are assisting scholars to archive their published works for greater access. And they are beginning to use open systems to help new journals develop and to lower costs and increase access for established journals. All these activities improve the scholarly environment of the Internet, and the last one, especially, is an important way to address concerns about the future of open access publishing. The recently formed [Library Publishing Coalition](#), which has over 50 members, is testament to the growing interest that libraries have in embracing this challenge. Library-based open access journals and library-managed peer-review processes are a major step toward address the problem of predatory publishing.

In a recent [issue brief for Ithaka S&R](#), Rick Anderson from the University of Utah calls on libraries to shift some of their attention from collecting what he calls “commodity” works, which many libraries buy, toward making available the unique materials held in specific library collections (often our “special” collections). This is not really a new suggestion, at least for those who focus on issues of scholarly communication, but Anderson’s terminology makes his piece especially though-provoking, although it also leads him astray, in my opinion. While Anderson’s call to focus more on the “non-commodity” materials, often unique, that our libraries hold is well-taken and can help improve the online scholarly environment, I do not believe that this is enough for library publishing to focus on. Anderson’s claim that by focusing on non-commodity documents will allow us to “opt out of the scholarly communication wars” misses a couple of points. First, it is not just publishers and libraries who are combatants in these “wars;” the scholars who themselves produce those “commodity” documents are frustrated and ill-served by the current system. Second, there is very little reason left for those products — the articles and books written by university faculty members — to be regarded as commodities at all. The need for extensive investment of capital into publishing operations, which is what made these works commodities in the first place, was a function of print technology and is largely past.

So libraries should definitely focus on local resources, but those resources include content created on campuses that has previously been considered commodities. The goal of library publishing activities

should be to move some of that content — the needs and wishes of the faculty authors should guide us — off of the commodity market entirely and into the “gift economy” along with those other non-commodity documents that Anderson encourages libraries to publish.

If libraries refocus their missions for a digital age, they will begin to become publishers not just of unique materials found in “special” collections, but also of the scholarly output of their constituents. This is a service that will grow in importance over the coming years, and one that is enable by technologies that are being developed and improved every day. Library publishing, with all of the attendant services that really are at the core of our mission, is the ultimate answer to how libraries should address the problem [described only partially](#) by the *Science* “sting” article.

# The big picture about peer-review

Thu, 10 Oct 2013 14:21:50, ksmithl2@duke.edu, [category: libraries, category: open-access-topics, category: scholarly-publishing]

In many mystery novels, there is a moment when someone makes an attempt to frighten or even kill the detective. Invariably, the detective reacts by deciding that the threat is actually a good thing, because it means that he or she is getting close to the truth and making someone nervous. In a sense, the [article in Science by John Bohannon](#) reporting on a “sting” operation carried out against a small subset of open access journals may be such a moment for the OA movement. Clearly the publishers of *Science* are getting nervous, when they present such an [obviously flawed report that was clearly designed to find what it did and to exclude the possibility of any other result](#). But beyond that, we need to recognize that this failed attempt on the life of open access does point us toward a larger truth.

A good place to start is with the title of Bohannon’s article. It is not, after all, “why open access is bad,” but rather “Who’s afraid of peer-review?” Putting aside the irony that Bohannon’s own article was, apparently, never subjected to peer-review (because it is presented as “news” rather than research), this is a real question that we need to consider. What does it mean for a journal to be peer-reviewed and how much confidence should it give us in articles we find in any specific title?

In the opening paragraphs of his article, Bohannon focuses on the *Journal of Natural Pharmaceuticals* as his “bad boy” example that accepted the bogus paper he concocted. He quotes a *mea culpa* from the managing editor that includes a promise to shut down the journal by the end of the year. But I want to think about the *Journal of Natural Pharmaceuticals* and about *Science* itself for a little bit.

I was a bit surprised, perhaps naively, to discover that the *Journal of Natural Pharmaceuticals* is indexed in two major discovery databases used by many libraries around the world, Academic OneFile from Gale/Cengage and Academic Search Complete from EBSCO. These vendors, of course, have a strong economic incentive to include as much as possible, regardless of quality, because they market their products based on the number of titles indexed and percentage of full-text available. Open access journals are great for these vendors because they can get lots of added full-text at no cost. But they do help us sort the wheat from the chaff by letting us limit our searches to the “good stuff,” don’t they? Maybe we should not be too sanguine about that.

I picked an article published last year in the *Journal of Natural Pharmaceuticals* and searched on one of its key terms, after limiting my search in both databases to only scholarly (peer reviewed) publications. The article I selected from this apparently “predatory” journal was returned in both searches, since the journal identifies itself as peer-reviewed. This should not surprise us, because the indexing relies on how the journal represents itself, not on any independent evaluation of specific articles. Indeed, I am quite confident that once this latest issue of *Science* is indexed in these databases, a search on “peer review” limited to scholarly articles will return Bohannon’s paper, even though it was listed as “news,” not subject to peer-review, and reports on a study that employed highly questionable methods.

Librarians teach students to use that ability to limit searches to scholarly results in order to help them select the best stuff for their own research. But in reality it probably doesn’t do that. All it tells us is whether or not the journal itself claims that it employs a peer-review process; it cannot tell us which articles actually were subjected to that process or how rigorous it really is. From the perspective of a student searching *Academic OneFile*, articles from *Science* and articles from the *Journal of Natural Pharmaceuticals* stand on equal footing.



Of course, it is perfectly possible that there are good, solid research articles in the *Journal of Natural Pharmaceuticals*. These indexes list dozens of articles published over the last four years, written by academic researchers from universities in Africa, India, Australia and Japan. Presumably these are real people, reporting real research, who decided that this journal was an appropriate place to publish their work. And we simply do not know what level of peer-review these articles received. So the question remains — should we tell our students that they can rely on these articles? If not, how do we distinguish good peer-review from that which is sloppy or non-existent when the indexes we subscribe to do not?

The problem here is not with our indexes, nor is it with open access journals. The problem is what we think peer-review can accomplish. In a sense, saying a journal is peer-reviewed is rather like citing an impact factor. At best, neither one actually tells us anything much about the quality of any specific articles, and at worst, both are more about marketing than scholarship.

The peer-review process is important, especially to our faculty authors. It can be very helpful, when it is done well, because its goal is to assist them in producing an improved article or book. But its value is greatly diminished from the other side — the consumption rather than the production side of publishing — when the label “peer-reviewed” is used by readers or by promotion and tenure committees as a surrogate for actually evaluating the quality of a specific article. Essentially, peer review is a black box, from the perspective of the reader/user. I don’t know if the flaws in the “bogus” article that Bohannon submitted were as obvious as he contends, but had he allowed its acceptance by the *Journal of Natural Pharmaceuticals* to stand, that article would look just as peer-reviewed to users as anything published in *Science*. The process, even within a single journal, is simply too diverse and too subject to derogation on any given day because a particular editor or reviewer is not “on their game” that day to be used in making generalized evaluations.

So what are we to do once we recognize the limits of the label “peer-reviewed?” In general, we need to be much more attentive to the conditions under which scholarship is produced, evaluated and disseminated. We cannot rely on some of those surrogates that we used for quality in the past, including impact factor and the mere label that a journal is peer-reviewed. Those come from a time when they were the best we could do, the best that the available technology could give us. Perhaps it is ironic, but it is open access itself that offers a better alternative. [Open peer-review](#), where an article is published along with the comments that were made about it during the evaluation process, could improve the current situation. The evaluations on which a publisher relies, or does not rely, are important data that can help users and evaluators consider the quality of individual works. Indeed, open peer review, where the reviewers are known and their assessments available, could streamline the promotion and tenure process by reducing the need to send out as many portfolios to external reviewers, since the evaluations that led to publication in the first place would be accessible.

There are many obstacles to achieving this state of affairs. But we have Bohannon’s article to thank for helping us consider the full range of limitations that peer-reviewed journals are subject to, and for pointing us toward open access, not as the cause of the problem, but potentially as its solution.

# Protecting IP?

Mon, 21 Oct 2013 15:11:13, ksmithl2@duke.edu, [category: uncategorized]

The American Association of University Professors recently issued a draft report, seeking comment, on the topic “[Defending the Freedom to Innovate: Faculty Intellectual Property \(IP\) Rights After Stanford v. Roche](#).” The report is very interesting; a strongly-worded warning that universities might be trying to assert more ownership over the IP rights in works created by faculty as the potential monetary value of that IP continues to rise. I want to make one comment about the report itself, and then use one of its significant themes to make some further observations.

By way of background, *Stanford v. Roche* was a [patent dispute that was decided by the Supreme Court in 2011](#). At issue was a diagnostic test for the HIV virus that was developed by a Stanford faculty member who worked both in a Federal-funded lab at Stanford and for a private biotech company. Part of the problem was conflicting language in the two employment agreements — when he joined the Stanford faculty, Professor Holodniy agreed that he would assign the rights and title in his inventions to Stanford, but when he was employed by Cetus, his agreement “hereby” assigned those rights in anything he invented to Cetus. The Supreme Court held that the immediate assignment in the Cetus contract overrode a promised assignment in the Stanford contract. Along the way they rejected Stanford’s proposed interpretation of the Bayh-Dole act claiming that that Federal law required that Universities receiving Federal funds own the patents in inventions that came out of those labs. Instead, the Court affirmed that eligibility for patent rights (they are not automatic) vests initially in the inventor and are then subject to assignments made by employment contracts. Universities are allowed to own and exploit patents to inventions that arise from work done by their faculty under federal grants, according to Bayh-Dole, but they do not automatically own those rights under the legislation. Since the Roche assignment was immediately effective, it trumped a promise to assign made in the Stanford contract.

The AAUP report focuses on the declaration that faculty own those inchoate patent rights, at least in the absence of a direct and immediate assignment to the university. But it is important to recognize that *Stanford v. Roche* involved complete assignments of those rights, both of which were made as conditions of employment.

That is why I am troubled by the easy analogy that the AAUP report makes between patent rights and copyright. It suggests in several places that ownership of copyrighted materials *could* be treated as employer-owned, just as Stanford was allegedly suggesting patent rights should be. But the report doesn’t really offer much substance behind this threat, citing only a conflict of interest policy at the University of Pennsylvania, which has no bearing on copyright ownership, and an academic article written by some university attorneys. Yet copyrights are really quite different. Unlike patents, they arise automatically as soon as original expression is fixed in a tangible medium of expression. Patent rights, on the other hand, require an application process that is long, costly and requires the specialized services of a patent lawyer. It is odd to me that in the section of the report defining the different types of IP rights, this difference is not mentioned.

The reason this seems significant to me is because it provides a possible rationale for a university to make a claim over patents developed on campus, and that reason does not apply equally to copyrights. When an invention developed on campus is patented, often the university invests significantly in obtaining those rights; unlike copyrights they do not simply arise directly as fruits of the research. While copyrights really are just spontaneous developments from the direct tasks faculty are hired to do, patent rights are not, even if the inventions themselves are. Patent rights cost money — often something over

\$20,000 — well beyond the investments made in the research itself. So even if we accept the AAUP's argument that the investment a university makes in supporting the research that leads to an invention should not automatically give that institution a right to share in any profits, the investment in actually obtaining the rights over that invention also needs to be considered. And the fact that no similar costs are associated with copyrights provides a sound reason, in my opinion, for the normal differentiation, which is that institutions make no or limited claims over copyrights (as "work made for hire") but assert a greater interest in patent rights, if they can be secured.

What really struck me about the report, however, and it is an emphasis I fully agree with, is its argument that both the universities and faculty research share an obligation to put scholarship in the service of society:

Patents are regularly used in industry to exclude others from using inventions. But faculty members should often be focused instead on creating conditions that give the public access to inventions... Commercial development of university knowledge to stimulate economic growth is unquestionably good. But some administrative practices associated with patenting and licensing operations may negatively affect economic growth as well as scholarship.

This is exactly right. In both the patent and the copyright arenas, concern for social welfare and the maximum impact of scholarship on economic and cultural development should have pride of place in IP practices. But in the copyright arena, we need to acknowledge that it is not usually institutional policies that undermine public access and economic development, it is the ingrained practice of giving copyrights away for free to commercial interest so that they can be exploited for private gain. It is unfortunate that the AAUP does not take the next step in its logic and remind its members that making provision for open access is a vital part of the commitment that the Association encourages.

"[F]aculty members should often be focused instead on creating conditions that give the public access." To do this, faculty authors must move beyond the practice, tied as it is to centuries-old technology, of surrendering copyright without remuneration AND without any guarantee that the fruits of their research will actually reach those who could benefit most from them.

During this Open Access Week, I hope the AAUP will look at this obvious extension of the appeal it is making in its draft report. University exploitation of patents may well be a threat to academic freedom and to public benefit, but so are the commercial companies that exploit the copyrighted products of academic labor for huge profits and lock up access to scholarship in order to defend those profits. Universities are harmed by this system, scholars are harmed by it, and society is harmed by it. The threats against which faculty IP rights need to be defended come from several directions, and the AAUP needs to recognize that.

Many people probably saw [this story](#) about a scientist who inquired about payment after she was asked to blog on a prominent scientific web site and was called a "whore" for declining to provide her writings for free. There are troubling gender and racial dynamics behind this outlandish reply, of course, but it also strikes me as very telling about the attitude toward scholarship and the value of copyrighted work. The expectation that scholars will give away their work for free is so ingrained that any suggested departure is treated quite rudely, to say the least. The result is that faculty scholarship makes money for lots of people, but not for the authors (at least, not directly) and certainly not for their universities, who have to pay millions to buy back the work they supported in the first place.

If we stop and think about it, this is an offensive situation. The remark of that blog editor has the salutary effect of illustrating just how offensive the routine expectations of publishers really are. Scholars need to defend their IP rights, as the AAUP report calls on them to do, and that defense should start with a refusal to transfer their copyrights without much stronger assurances that their work will be available to provide the social, economic and scholarly impact for which it was written for in the first place. Perhaps the AAUP could begin to organize that kind of response, in order to make good their commitment to public access and economic growth.

# What's up?

*Tue, 29 Oct 2013 08:12:22, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]*

Is it just greed? Is that what is behind the lawsuit over e-reserves and copyright infringement that publishers continue to pursue against Georgia State University?

Yesterday [Publishers Weekly published a short item](#) reporting that the Copyright Clearance Center, which is helping to bankroll the GSU lawsuit, paid out a record amount of royalty monies to rights holders in the 2013 fiscal year. Royalties paid by the CCC have increased by more than \$35 million in the past three years alone. So why the lawsuit? This news calls into question the motivations of Oxford University Press, Cambridge University Press and Sage Publishing, who continue to pursue a feckless and wholly unnecessary attack on higher education.

Usually one hears two different explanations for this lawsuit. One is that publishers just want clarity about fair use. The other is that permissions income is vital for the survival of academic publishing.

To start with the first claim, it seems to have gone out the window once the plaintiff publishers decided to appeal the decision by Judge Evans in the District Court. In that decision, Judge Evans laid out very specific rules about fair use as it applies to e-reserves in a non-profit educational institution. If clarity was what was being sought, the Judge's 350 page decision provided it. In fact, my own objection to that ruling is that it went too far in removing the flexibility of fair use, at least for the situation that was before the court. On the other hand, the publishers did not like it because it was not rigid enough; they did not simply want clarity, they wanted fair use rendered toothless. And since the Judge did not do that, but merely provided the kind of guidance the publisher claimed to be seeking, they chose to appeal her decision.

The second claim for why this lawsuit was needed does not fare any better. In her trial court decision, the Judge held that revenue from permissions was not a significant part of the value of most of the academic books at issue, and the publishers [complained loudly](#) about that holding, saying that "publishers cannot sustain the creation of works of scholarship" without increasing revenue from licensing. First of all, academic publishers do not "create" works of scholarship, nor do they pay those who do create them, most of the time. So it is hard to see why that ever-increasing income stream is really so necessary. But now we learn that that revenue stream is growing, at a very nice rate, thank you very much. The picture painted by CCC's announcement, as reported by *Publishers Weekly*, is of a system that is working quite well for publishers. If the revenue from licensing must go up for academic publishing to survive, as publishers claim, well, it is.

So how much is enough? I have [always believed](#) that behind this lawsuit is a belief that copyright exists so that rights holders, who most often are intermediaries and not the original creators, can extract every conceivable penny from every use of every copyrighted work. From that perspective, fair use is a gigantic mistake and these revenue figures from the CCC are irrelevant. But that is not the purpose of copyright law. The copyright monopoly exists to give an incentive to authors and creators to continue writing and creating. Since very little of the \$188.7 million that the CCC distributed to rights holders in FY 13 actually goes to creators, it is deadweight loss, in economic terms, as far as the incentive purpose of copyright is concerned. And it raises the question of how much income is enough; how much inefficiency in the system is required before these publishers will be satisfied?

I am looking forward to the oral arguments for this appeal on Nov. 19, and I hope the judges on the appellate panel are well-enough informed and savvy enough to ask that question of the lawyers for Oxford, Cambridge and Sage. The Eleventh Circuit should demand, just as Judge Evans did, to see the books for these companies (including the CCC) and to make an independent and common sense decision, guided by public policy and sound economics, about what a sensible profit really is. Because it is very clear that the plaintiffs will never admit that they have squeezed enough money out of higher education in the United States.

# A line in the sand

*Tue, 12 Nov 2013 08:35:19, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: libraries, category: scholarly-publishing]*

The [Chronicle of Higher Education recently published an article](#) about library outrage over the recent decision by Harvard Business Publishing to claw back some functionality for key Harvard Business Review articles that many libraries subscribe to on various EBSCO platforms, and to charge a separate licensing fee to recover that functionality. I also will have an [article dealing with this issue on the Library Journal Peer-to-Peer blog](#) (to be published on Thursday). But I want to say one more thing about it.

Harvard Business Publishing is treating this as an issue between themselves and the institutions that subscribe to HBR via EBSCO. They accuse faculty of using articles as course readings without paying the “required” extra fee, and are disabling the EBSCO versions to force that additional fee. But this is a skewed perspective. From the point of view of the subscribing institutions, what is happening is that they are getting less functionality from EBSCO and are now being asked to pay HBP to regain that function.

Properly viewed, I suggest, this is not a dispute between libraries, or faculties, and Harvard. It is a dispute between Harvard Business Publications and EBSCO over how to divide up the pie. And libraries should refuse to make the pie bigger just to settle that dispute.

To be clear, the functions that HPB says are being wrongly exploited — printing, downloading and persistent linking — have been a part of the EBSCO databases for years. HBP would argue that their special licensing terms with EBSCO (which were impossible to convey to faculty, since they make no sense) have always forbidden classroom use. But the truth is, these technological changes are intended to prevent faculty from even giving students a reference to an article and asking the students to read that article on their own. HBP wants to recover a separate fee even for that.

So the demands made by HBP really do break the EBSCO database as it has been purchased for years. If libraries are going to lose functionality they have been buying over that time, they must demand a reduction in the price that is paid to EBSCO. What is remarkable in this case is that the value of the lost functionality is easily quantifiable; it is represented by the new licensing fee that HBP plans to charge.

This is what I mean by insisting that this is a dispute between EBSCO and Harvard. Libraries should refuse to pay more significantly more for the same functionality, especially since that functionality is so central to what we buy journal aggregator databases for. If we have to pay Harvard this license fee, basic fairness suggests that what we pay EBSCO be reduced by the same amount. EBSCO has been strangely silent during this controversy. But libraries should draw this line in the sand — we will spend no more than some reasonable percentage increase — a single digit percentage, certainly — over our current EBSCO subscription to get the same functions we had last year. Harvard and EBSCO can discuss any changes in the way that money is split between them, but that is not our problem. If Harvard wants \$200,000 more from us, we must pay EBSCO \$200,000 less.

Few librarians would dispute the proposition that we cannot keep paying massive increases to get the same publications and same capabilities that we had before. It is unsustainable, and it is unfair. This price increase, for that is what it is, is especially massive. If Harvard Business Publications cannot make do with the revenue they have had for decades and suddenly needs millions more, that is a problem with how they run their business, not with what EBSCO subscribers expect to get, and have gotten for

years, for their subscription dollars. And they need to take that demand up with the platform provider, since it is that platform that they are insisting be broken.

Nevertheless, librarians have not been good at actually saying no. This is the moment to strengthen our spines and refuse to pour more money into the fraught relationship between Harvard and EBSCO; we must let them settle the matter between themselves. If we do not draw this line in the sand, we will continue to get that sand kicked in our faces.



# A wide-angle lens on fair use

*Sun, 17 Nov 2013 13:58:33, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

I first saw the news about [Thursday's decision affirming fair use](#) in the Authors Guild v. Google Books case when I turned my phone back on after an eleven hour flight from Istanbul. The Turkish Air plane was still taxiing at JFK at the time, so when I cheered out loud I got a lot of bewildered looks from my fellow passengers. I tried to explain to the folks sitting near me what I was so elated about, but I don't think it translated well.

Fortunately, it is much easier to explain the impact of this ruling here, mostly because so many of our colleagues stepped up to the task quite quickly. The best thing I can do for my readers is probably simply to direct you to a few of those discussions; I especially recommend those by [Kenny Crews](#), [Nancy Sims](#) and [Brandon Butler](#). There is also this [interesting piece by Eric Goldman](#) in *Forbes*, and [this story from the New York Times](#).

The case, of course, has been going on for over eight years, and got very complicated when a proposed settlement, that would have imposed a sweeping revision to copyright relationships in the U.S., was proposed, revised, and rejected. A class-action was certified by the judge, but vacated on appeal and the case was sent back to the trial court for a ruling on fair use. For all that complexity, however, the fair use ruling seems to have been pretty easy. Certainly Judge Chin handed down a sweeping affirmation of fair use for book scanning when the purposes of that scanning are preservation, indexing and access for persons with disabilities. Since this parallels the decision made by Judge Chin's colleague Judge Baer in the HathiTrust case last year, it was perhaps more predictable than many of us thought. And, of course, there is a growing body of precedent about fair use out of not just the Second Circuit but also the Fourth, Ninth and Eleventh Circuits that all pointed Judge Chin in this direction.

What is most remarkable and valuable about this ruling is not any new ground it breaks in fair use law, but its meticulous placement of that law back where it first arose — in the issue of public benefit and the purpose of copyright. It looks at fair use with a wide-angle lens, which helps us see more clearly the correct placement of the discussion. Before he begins his analysis of the question of fair use, Judge Chin catalogs the benefits of the Library Project and Google Books. That catalog includes a searchable word index of tens of millions of books that benefits libraries and researchers, the facilitation of new types of research through text and data mining, access to books for traditionally underserved populations, especially including the disabled, book preservation, and the generation of new audiences for authors as well as new income for publishers. After he completes his four factor analysis — finding that three factors strongly favor fair use and only one, the amount used, “weighs slightly against” it — Judge Chin reiterates this list of benefits and concludes that “Google's actions... advance the arts and sciences [and therefore] constitute fair use.”

Fair use was developed by judges over a century and a half ago to ensure that the exclusive rights in copyright did not choke off the very progress of science and the useful arts they were intended — constitutionally required, in fact — to serve. By “book-ending” his analysis, as one of my colleagues expressed it, with the public benefits of Google Books and the purpose of copyright, Judge Chin has created a powerful context for his ruling and an important reminder for all of us of what this odd body of law is really for.

In this context, it is very easy to see how selfish and myopic these lawsuits against libraries (in the broadest sense, since the decision in this case focuses a lot on the benefits of GBS to libraries) really are. The Authors Guild is really asking the courts to forget about students, researchers, blind people, poor people and even the very authors they are supposed to represent in order to preserve some notional expectation of a windfall profit that might be discovered someday when they finally figure out the internet. As Brandon Butler puts this point, “There is no pot of gold at the end of these lawsuits, and the research tools they are trying to kill are their best hope of finding an audience.” I am reminded of Aesop’s fable about the dog and his reflection, where the greedy dog with a bone sees his own reflection in a stream and, trying to snatch the bone away from the “other” dog, drops what he already has into the water. Increasingly the Authors Guild, as well as the publishers in the Georgia State case, look a lot like that greedy and foolish dog.

The Authors Guild has already announced the mind-bogglingly stupid intention to appeal this case. After eight years of pouring money into it, failing to find the pot of gold they hope to gain from a settlement, and losing on the key legal principle they were fighting for, the AG apparently has learned nothing. But the chances of a reversal on appeal seem very slim. Judge Chin’s analysis is tight and firmly grounded in the fundamentals of copyright law. It is supported by a rapidly growing body of precedent and it parallels another decision made in the same Circuit last year. Finally, it grows out of a remand, from the same panel that will hear any further appeal, that clearly communicated the belief of those judges who sent the case back that fair use applied to Google Books. In that remand, the judges who were asked to rule on the issue of class certification sent the case back (without a decision about the class action) with instructions to consider fair use. Had Judges Laval, Parker and Cabranes not thought that a finding of fair use, which would make the class question irrelevant, was likely, this would have been a futile waste of judicial resources, something overworked federal judges avoid like the plague. So there is already very strong reason to think that the AG’s appeal will fail.

Finally, in spite of my remark about there being little in this decision that is very new, I think there are two important conclusions that we can take from this ruling. First, it is a reminder that the commercial nature of a user does not automatically rule out fair use. In his decision, Judge Chin properly focuses on the use, which has tremendous public benefits and which does not directly generate a profit, rather than the user. In the context of the educational benefits of the Book Search, the fact that Google is a for-profit company is really trivial to the analysis. Second, the decision provides an important perspective on mass digitization. Rights holders often focus on the scale of a project and assume that large-scale reproduction cannot be fair use. This is the core of the publishers argument in the Georgia State appeal, and it is wrong. Both Judge Chin and Judge Baer have now concluded (and Judges Laval, Parker and Cabranes have strongly hinted their agreement) that even massive digitization, when it is done for a transformative purpose, can be fair use.

# Taking a stand

*Tue, 26 Nov 2013 14:45:00, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: international-ip, category: libraries, category: open-access-and-institutional-repositories]*

When I wrote a [blog post two weeks ago](#) about libraries, EBSCO and Harvard Business Publications, I was attending the eIFL General Assembly in Istanbul, and I think the message I wanted to convey — that librarians need to take a stand on this issue and not meekly agree to HBP’s new licensing fee — was partly inspired by my experiences at the eIFL GA.

Having attended two eIFL events in the past four years, I have learned that many U.S. librarians are not aware of the work eIFL does, so let me take a moment to review who they are. The [core mission of eIFL](#) is to “enable access to knowledge in developing and transition countries.” They are a small and distributed staff that work on several projects, including support for the development of library consortia in their partner countries, negotiating licenses for electronic resources on behalf of those consortia, developing capacity for advocacy focused on copyright reform and open access, and encouraging the use of free and open source software by libraries. The key clientele for eIFL are academic libraries, and all of the country coordinators and delegates that I met at the General Assembly were from colleges and universities. But eIFL also has a project to help connect communities to information through public libraries in the nations they serve.

The delegates at the General Assembly came from Eastern Europe, Central Asia and Africa. These librarians face a variety of local conditions and challenges, but they share a common commitment to improving information access and use for the communities they serve. It was the depth and strength of that commitment that I found so inspiring at the event. I wanted to encourage U.S. librarians to take a stand because these librarians from all over the world are themselves so consistently taking a stand.

One way these librarians are taking a stand is in negotiations with publishers. There were lots of vendor and publishing representatives at the General Assembly, and time for each delegation to speak with each vendor (“speed dating”) was built in to the schedule. Although these meetings were short, they were clearly intense. One vendor rep told me that they were difficult because the librarians had diverse needs and were well-versed for the negotiations. He also told me that he enjoyed the intensity because it went beyond “just selling.” And that is the key. These librarians are supporting each other, learning from each other and from speakers at the event what they can expect and what they can aspire to with their electronic resources, and taking those aspirations, along with their local needs, into negotiations. They are definitely not “easy” customers because they are well-informed and willing to fight for the purchases that best serve their communities. Because they cannot buy everything, they buy very carefully and drive hard bargains.

Another area in which these eIFL librarians are taking a stand is in regard to copyright in their individual nations. I saw several presentations, from library consortia in Poland, Uzbekistan, Mongolia and Zimbabwe, about how they had made their library consortia into recognized stakeholders in discussions of copyright reform on the national level. One consortium is offering small grants for librarians to become advocates for fair copyright; another has established a copyright “help desk” to bring librarians up to speed. One of the eIFL staff emphasized to me the importance of this copyright work. Copyright advocacy is part of the solution, I was told, to the problem of burdensome licensing terms that have often been seen in those parts of the world.

One story was particularly interesting to me. An African librarian told how publishers in her country often view libraries and librarians as a major “enemy” because it is believed that they encourage book piracy. Through the consortium of academic libraries, librarians have now become actively involved in a major publishing event that is held annually in her country, and recently the libraries were asked to nominate a board member to that group. As a result of these efforts, the relationship between librarians and publishers has improved, and there is much more understanding (thus less suspicion) about library goals and priorities.

eIFL librarians are also taking a stand amongst their own faculties by advocating for open access. There were multiple stories about new open access policies at different universities, and about the implementation of repository software. There were also multiple presentations to convey the advantages that open resources offer to education. These presentations discussed MOOCs (that was me), open data, alternative methods of research assessment and text-mining. If these sound familiar, they should. In spite of difficult conditions and low levels of resourcing, these librarians are investigating the same opportunities and addressing the same challenges as their U.S. counterparts. Just to illustrate the breadth of the interest in the whole topic of openness, I wrote down the countries from which the librarians who grilled me about MOOCs came when I spent an hour fielding questions; they came from Azerbaijan, Lesotho, Kyrgyzstan, Lithuania, Malawi, Maldives, Macedonia, Fiji, China, Thailand, Ghana, Belarus, Armenia, Uzbekistan, Swaziland and Mongolia. They came with questions that challenged my assumptions (especially about business models) and deepened my own understanding of the international impact of open online courses.

There is one last conversation I had that I want to report on, both for its own sake and because of how it illuminates the eIFL mission. Mark Patterson, the editor of the open access journal eLife, was at the GA to talk about research assessment. Later I sat and talked with him about eLife. He told me that the most exciting thing about eLife was its model whereby scientists reclaim the decision about what is important to science. While the editors of subscription-based journals must always strive for novelty in order to defend and extend their competitiveness, eLife and, presumably, other open access journals, have scientists making decisions about what is important to science, whether or not it is shiny and new. Sometimes there is an article that is really important because it refines some idea or process in a small way, or because of its didactic value. Such articles would escape the notice of many subscription journals, but the editors at eLife can catch them and publish them. And the reason this seems to fit so well into the eIFL context is because it is about self-determination. Whether I was talking about open access journals with Mark or to the country delegates at the GA, this was the dominant theme, the need to put self-determination at the center of scholarly communications systems, from publishing to purchasing.

# A discouraging day in court for GSU

*Wed, 20 Nov 2013 08:35:42, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]*

The best word to describe yesterday's oral argument at the Eleventh Circuit Court of Appeals in regard to the appeal of the Georgia State University e-reserves decision is probably bizarre. But that has to be qualified; they were bizarre in a very discouraging direction for GSU and fair use in the academy.

When I read the briefs for this appeal, along with Judge Evan's massive opinion from the trial in which she developed and applied a careful fair use analysis, it was hard for me to imagine how Georgia State could lose on appeal. The trial judge was right on both the law and the policy of copyright. But the oral arguments showed me that there was a way that it could happen — if the appellate judges got lost in the weeds and started chasing the argument down rabbit holes. It is worthwhile, if discouraging, to peek down some of these rabbit holes because they help illuminate some of the errors the appellate panel was laboring under.

Although the tenor of the arguments was mostly hostile to Georgia State, lawyers for both sides seemed bewildered by the direction of the questioning, and neither one was able to lay out a very persuasive argument. The day started badly for Bruce Rich, the lawyer for the publishers, when he was brusquely told to stop puffing about how important and civic-minded his clients were. He was immediately asked to defend the injunction his clients have sought from the court, specifically because it would impose a bright-line limit on fair use. The publishers want a definitive statement that 1000 words is the absolute maximum for fair use of their works, but the court was not buying it. On this issue they also gave Steve Schaetzel, representing GSU, a hard time about Judge Evans' 10% or one chapter rule, asking if that "bright line" was a legal error (which would justify reversal or remand) because it removes the flexibility from fair use.

This is a difficult issue. It is hard to see how some standard for amount, the third fair use factor, cannot be used when examining a large group of excerpts used in the same way. So we have to ask what kind of order do the judges want; they seem to have painted themselves into a corner on the issue of amount. It seemed clear that they were not happy with the publishers' proposed injunction, which was the good news of the day, but also possible that they would issue an injunction of their own, which would not be good at all. GSU made the plausible argument that the 10% standard was an analytic tool, not a bright line, which is supported by the fact that Judge Evans did not treat it as absolute, but flexed it a bit in light of the other factors. The judges did not seem to get that point.

Another "rabbit hole" was the issue of market harm. One of the judges, Judge Marcus, raised the question of whether Judge Evans had impermissibly "shifted the burden" on this factor by asking whether publishers offered digital licenses. The general rule is that defendants (GSU, in this case) have the burden of proving fair use, and lawyers and judges love to watch out for inappropriate burden shifting. Mr. Rich was quick to agree that this was an error made by Judge Evans, but of course it is no such thing. She simply ruled on this factor based on facts that were in the record before her. Specifically, the publishers argued that they were losing licensing income due to the claim of fair use, so she asked if they were offering licenses. When told that some of the plaintiffs (i.e. Cambridge University Press) were not, she properly concluded that this factor did not always favor the publishers. But, again, time was wasted pointlessly on this, and the error that Judge Marcus was making was never cleared up.

Then there was the analogy between course packs, and the so-called course pack cases, and electronic reserves. The publishers push this analogy very hard, and the judges seemed to mostly accept it. This may be the worst sign for GSU. Even when Judge Tjoflat acknowledged that he was using the language of course packs as a mere convenience, he seemed unable to get out of the way of its implications. Schaetzel did make the point, on behalf of GSU, that e-reserves were a lot more like a traditional reserve room than they are like course packs, but the panel persisted in its error. One difference between the GSU case and the course pack cases, of course, is the wholly non-commercial nature of e-reserves, whereas the course packs in those cases were made and sold by commercial entities. Also, a course pack creates a physical artifact that a student can keep forever, while an e-reserve reading is ephemeral, available only during the course and inexorably tied to the specific pedagogy. When the differences were pointed out to Judge Tjoflat, he merely switched to a hypothetical and plowed ahead, clearly trying to extract some kind of admission from Schaetzel even though that admission would be entirely irrelevant.

Perhaps the most bizarre moment in the arguments came at the very end, when Judge Marcus was pushing Schaetzel about the second fair use factor and Judge Evans' conclusion that it favored GSU because the works in question were informational. The Judge seemed to lose track of the fair use analysis entirely when he posed what he clearly believed was a devastating question, asking Schaetzel if *The Origin of the Species*, one of the most important books in science, should lose copyright protection simply because it was factual. The confusion here is obvious. First, *The Origin of the Species* has already lost copyright protection and is in the public domain, yet science still advances. Second, all the factual nature of the book would mean, under Judge Evans' analysis, is that the second factor of the fair use framework would be more likely to favor fair use; there is no question of "losing copyright protection" for Darwin's book or for any of the works in the GSU e-reserves system. Finally, the very importance of *The Origin of the Species* is a reason why it *should* be subject to fair use; it is too central to modern thought to make access to it entirely dependent on paying some publisher a fee every time even the shortest excerpt of the book is used. That would be crippling to scientific education.

If Judge Marcus really wanted to use Darwin's masterpiece to explore the second fair use factor, he should have asked Bruce Rich if he thought copyright protection was a major factor in Darwin's decision to write the book. The incentives created by copyright, of course, seldom make any difference to academic or scientific authors, who write because it is part of the advancement of knowledge. It is comical to imagine Darwin, on board *The Beagle*, calculating royalties as he decides whether or not to share his insights about natural selection. It is precisely that disinterest in the economic rewards enabled by copyright that allows academic publishers to free-ride on the system and sell works that they obtain for nothing at great profit. The case brought against GSU is an extension of that free-riding, and a properly focused examination of the second fair use factor would have exposed it. Unfortunately, the arguments never went there.

So what can we expect next? It is always possible that the three judges will go back to their chambers, reread the briefs, and discover how off-the-wall their approach during the oral argument was. So a good ruling, presumably largely affirming Judge Evans, is not impossible. But it seems quite unlikely after yesterday. One alternative would be for the Appeals Court to remand the case, sending it back to Judge Evans for reconsideration in light of instructions they would provide. They could, for example, remand telling her to not use a bright-line 10% standard and not to "shift the burden" to publishers on the fourth factor. If they did that, it is perfectly possible that Judge Evans would go back to the record and arrive at the same result; she would just have to alter the language of her analysis a bit. Certainly if a more flexible standard for the amount used is employed, and pedagogical necessity is made the yardstick, Judge Evans might find even fewer infringements.

The more troubling possibility is that the Court of Appeals panel might reverse the lower court and issue an injunction. It seems clear that they would not be willing to endorse the sweeping injunction that the publishers have requested. They do not want to provide prospective instructions that would remove the flexibility from fair use. So the most likely thing, if they take this direction, is an injunction related only to the 48 excerpts analyzed in the original opinion, presumably using a different analysis and coming to different conclusions. Such an injunction would tell GSU how to deal with those works that were actually contested at trial and then, presumably, expect GSU to “get the message” as regards future assertions of fair use without dictating prospective standards.

Perhaps the most important message to come out of this day came from the panel discussion held at GSU after the arguments. Lisa Macklin, the Director of the Scholarly Communications Office at Emory University, who has a smart and sensible perspective on most issues, reminded us that the problem being fought over in this lawsuit would go away if the academy would more fully embrace open access. The core problem here is the donation of copyright in academic works to publishers who then exploit them to earn every possible penny of profit. Scholarship suffers due to the greed of these publishers (my words, not Lisa’s). So scholarship would be better served if we stop giving the key resource of the academy away to those who are poor stewards of it. Instead we need to have authors retain copyright and offer those authors a variety of ways to disseminate their work that better serve their needs and the interests of the scholarly enterprise.

Yesterday was a discouraging day, suggesting that storm clouds might be developing in the area of academic copyright. But if that storm breaks, the opportunity to renew and strengthen our commitment to open access might be the silver lining we can find in those clouds.

Note — this post was updated to correct the spelling of Judge Gerald Tjoflat’s name. Thanks to Kenny Crews for pointing the misspelling out.

# Fair use, Georgia State, and the rest of the world.

*Mon, 02 Dec 2013 07:26:36, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: international-ip, category: scholarly-publishing]*

UPDATE — Since I wrote this post, Professor Niva Elkin-Koren of Haifa University has kindly informed me that an English translation of the settlement agreement discussed below is now available on the [Israeli A2K in Higher Education website](#). The direct [link to the translated settlement is here](#).

Ever since the Georgia State copyright lawsuit over e-reserves began, people have suggested an analogy to the ill-fated and now renounced litigation campaign by the recording industry against customers who downloaded music files. It took years, but it finally dawned on the recording industry that suing your own customers was a bad strategy, pursued only by a desperate industry that cannot figure out how to retool their businesses to offer services that people really need and want. But as I tell folks, the publishers suing Georgia State have made an even more foolish decision, since they are suing people who are not just their customers, but also their suppliers. The very academics that are vilified as thieves in this lawsuit are the ones who produce the content that Oxford, Cambridge and Sage take, usually for free, to resell at a high profit. This is one reason why the publishers cannot win this case, even if the 11th Circuit follows the ill-logic they displayed at oral arguments and gives the publishers some kind of Pyrrhic victory. The attention they are bringing to their own greed and mismanagement will drive more of the authors they depend on to stop giving these publishers free content to sell, and the current economics of higher education guarantees that they will not be able to offset their losses through the increased permission fees they dream about.

All of this is old news. But as these three publishers continue to pursue a suicide mission in the U.S., we can see that other, more sensible segments of the same industry, are taking a more sensible approach. As [this blog post from University of Toronto law professor Ariel Katz](#) describes, publishers and academic groups in Israel have come to an agreement about fair use that shows just how grasping and ill-conceived the GSU case is.

Israel adopted a fair use provision nearly identical in language to the U.S. provision in the 2007 revision of its (Israel's) copyright law. And, just as in the U.S., a couple of Israeli publishers brought a lawsuit against Hebrew University alleging copyright infringing, a case clearly designed to test and define the limits of the new fair use provision. But in Israel the case has settled, with an agreement announced last week that defines fair use in a very sensible way that indicates a real commitment to scholarship and education on the part of these Israeli publishers, something wholly lacking from the U.S. plaintiffs.

According to Katz, the settlement in the Israeli case recognizes that both e-reserves and course packs are fair uses of copyrighted material, with full journal articles and excerpts of up to 20% of books falling within the fair use definition. Note that this agreement allows unauthorized excerpts that are twice as long as the ones tolerated by Judge Evans in the GSU trial decision, which the U.S. publishers are disputing. This, like a great deal of other evidence, shows us that the U.S. plaintiffs are not simply trying to protect their businesses, as they claim; they are asking the courts to grant them windfall profits they have not earned and do not deserve. Apparently these smaller Israeli publishers think they can live with this agreement, while some of the richest academic publishers in the world are crying poverty to the U.S. 11th Circuit.



There are some additional qualifications on this Israeli settlement that are worth noting. The e-reserve systems must be accessible only to students registered for a specific class in order to be fair use, something that is almost always true in the U.S. as well. Course packs must be produced only on demand and sold only to students registered in a class and at cost. These limitations are, I believe, things that U.S. higher education would be happy to abide by as well, but the publishers appear to be unwilling to show the same spirit of compromise that their Israeli colleagues have. Finally, Hebrew University has agreed to pay legal costs for the publishers— less than \$100,000 — without admitting any culpability for copyright infringement. Overall, this is a sensible compromise between sensible parties, something foreclosed in the U.S. by the irrational greed of the GSU plaintiffs.

As Katz points out, this agreement in Israel is not a license being granted to universities by publishers; it is a definition of fair use within a specified context. And, interestingly, it includes a mutual recognition of the [Code of Best Practices for Use of Works in Research and Teaching](#) that has been developed in Israel to interpret fair use. This Code of Best Practices is similar in some ways to the Code from the Association of Research Libraries; it is certainly not more conservative than the ARL Code. The Israeli Code explicitly recognizes that the amount used should be considered in relationship to the purpose, and that a loss of income to the publisher does not automatically foreclose fair use. In thinking about the nature of the original, a topic that confused the 11th Circuit judges so badly, the Israeli Code does not waste time debating factual versus fictional and instead recognizes the greater accessibility required for works “of an academic character.” It also adopts the same fourth factor criteria favoring fair use that Judge Evans used in the GSU trial, the unavailability of licenses specifically for electronic use. Finally, the Israeli Code treats transformative fair use properly, recognizing that transformation is an important but not required element of the first factor analysis, and that transformation can occur either through actual alterations to the original or when there is a “use of a work in a different manner or for a different purpose or function than that of the original work.”

The Israeli Code of Best Practices is very much worth reading, and there is an interesting article about the Israeli experience with fair use for higher education by four academics [available here](#).

All of this, as well as discussions about fair use in Canada, Great Britain and Japan, suggest that the rest of the world is getting the hang of fair use. They are realizing that fair use is absolutely essential for a copyright law in the digital age, lest the exclusive rights become an economic and technological drag on a nation. What Judge Evans decided in the GSU case was squarely in the mainstream of fair use thinking; it was even rather conservative when viewed through the lens of developing international thinking about fair use in a digital age. If the silly misunderstandings of the 11th Circuit panel of judges lead them in another direction, it will be one more obstacle that will eventually have to be overcome to prevent cultural and economic stagnation. But internationally, the trend is to ensure that fair use serves education and eases the transition to digital teaching and learning, a goal that at least some publishers seem to support.

# Connecting the Dots

Wed, 11 Dec 2013 10:02:18, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]

The American Association of University Professors is an important organization, and its emphasis on protection the intellectual property rights of academics is admirable. It is precisely because their work is so important, and because they often seem to be right on the verge of connecting all of the dots related to copyright, publishing and academic freedom, that their statements sometimes frustrate me.

In November the AAUP issued a [report on “Academic Freedom and Electronic Communications”](#) that has been widely and justly praised for addressing the revolution in scholarly communications in the digital age in a comprehensive way and keeping the issue of academic freedom firmly at the center of the discussion. As this [article in Inside Higher Ed](#) puts it, the AAUP is updating long-standing commitments in light of a “whole new world.” For example, the AAUP has recently reaffirmed its position that the copyright in online courseware should remain in the hands of the faculty creators of those courses, a position that was also endorsed by the Duke Academic Council last week.

It is because the AAUP sees that copyright ownership is an integral part of academic freedom that I find its new report just one dot short of a complete picture. The juxtaposition of two quotes in the *Inside Higher Ed* article underscores just how close the AAUP gets to seeing the core of the problem:

“While the expanding digital world has promised to make information freely accessible to a global community, commercial forces have locked up most research behind paywalls and ever-more-restrictive licensing agreements,” the report reads. “Any consideration of open access” must conform with the organization’s 1999 “Statement on Copyright,” which concluded that “it has been the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member’s own initiative for traditional academic purposes.”

The AAUP wants faculty members to own their own copyrights, with which I agree. And they recognize that commercial interests are locking up research, which is undeniable. But two facts go unacknowledged in the report — the fact that commercial interests can lock up research only because faculty **do not** retain their copyrights but give them up for free to those interests and the fact that this surrender of copyright to commercial publishers is a huge threat to academic freedom.

If we needed additional evidence for this second assertion, we got it last week as the news came out (see stories [here](#) and [here](#)) that publisher Elsevier was sending “take down notices” to the [Academia.edu website](#) demanding the removal of article PDFs that the authors have posted to that site in an effort to share their research and facilitate scholarly conversation. The move is sure to generate bad publicity for Elsevier; one commentator called it an “unforced error.” The publishing giant just seems unable to comprehend that they depend on academic authors to give them for free the content that they then sell at a huge profit. But don’t get me wrong; Elsevier is within its rights to do this; as the copyright owner in these articles it can allow or forbid whatever covered uses it wants, and its general copyright transfer agreement with authors does not allow those authors to post the final PDF of articles they have written.

This is precisely my point, of course — because authors have given their rights away to Elsevier, it is Elsevier and not the faculty authors who can determine the scope and depth of any subsequent scholarly discussion about the article. Faculty options for pursuing their own work are limited by the ownership of copyright by Elsevier and other publishers. Academic freedom suffers from this common practice of copyright transfer.

The AAUP focuses, in my opinion, on only a part of the problem, and the lesser part of it at that. They are concerned to protect authors from claims over their work by the universities that employ them, which is a real but infrequent threat. In the process, however, they ignore the much greater threat posed to academic freedom by the commercial interests that routinely are the recipients of uncompensated copyright transfers. If the AAUP is really serious about a discussion of copyright ownership and its relationship to academic freedom, they need to be willing to discuss this “third rail” of that conversation, this practice of giving copyright away. In short, open access, or, more accurately, leaving the decision about access in the hands of faculty authors, is not an optional part of the discussion.

So let’s have a discussion of open access that conforms to the AAUP’s 1999 Statement on Copyright. But let’s be honest about “prevailing academic practice,” which has been to treat faculty members as the owners of copyright for only a very short time, after which control of the dissemination and use of scholarship has routinely been surrendered to organizations with little or no accountability to faculty members or their representatives. Perhaps in the print age that surrender did not matter and did not impede academic freedom. But in a digital age, when faculty have so many more opportunities to share their work and advance their own scholarship, ceding control over copyright is a big problem, with big implications for academic freedom, as the Elsevier attack on Academia.edu proves. This is the elephant in the AAUP’s living room, and they need to address it by encouraging faculty members to retain their rights beyond initial publication.

For a moment, let’s try a thought experiment. Suppose a new university is being founded, Innovative University. At IU the “start from scratch” copyright policy does exactly what the AAUP fears and asserts that all faculty scholarship is work made for hire. If, at that point, faculty authors had to go to IU to ask permission for ever use they wanted to make of their own works, that would be essentially the same situation that is in place now, once the authors have transferred copyright to the publishers. If the university did not want a paper to be posted to Academia.edu, they could demand that the article be removed, exactly as Elsevier has been doing. Both these scenarios are, it seems to me, equal impositions on academic freedom and both, I believe, should be the focus of attention from the AAUP.

But we can carry our thought experiment a bit further and imagine that IU would not want the burden of granting permission for every publication or re-posting. To avoid that, they give a license to all faculty authors which allows them to post and publish their works wherever they wish and to retain the profits from those publications, if any. The only restriction on this license is that no copyright transfer or perpetual exclusive license may be granted by the faculty member to a third party without permission. In that imaginary situation, it seems to me that faculty authors would actually be better off than there are in the current reality, in which copyright is transferred as a whole to commercial interests. They would have greater certainty and greater flexibility regarding use their own works than they do under the current system, and a much easier channel through which to seek any permission that would be necessary in extraordinary situations. The University and the public would certainly be better off. The copyright would not be held by the author, as it is not currently in nearly all cases, but it would be in the hands of an institution whose goals and values are much more aligned with scholars and scholarship than is currently the case. In short, one can easily image a situation where the worst fears of the AAUP

are realized, yet the threat to academic freedom is still less than it is when, as now, commercial interests hold copyright in academic works.

In spite of my thought experiment, I agree with the AAUP that the best alternative is for faculty to retain their copyrights in most cases, as long as they really retain them, so that they, the authors, maintain control over the future of scholarship. That, after all, is what we mean by academic freedom, isn't it? Instead of focusing on only one aspect of the copyright issue, a discussion led by the AAUP about IP rights and academic freedom should focus on the potential to more fully exploit copyright ownership to the benefit of its faculty owners. That means talking about authors' rights, publication negotiations, promotion and tenure evaluations, and even open access.

# Reflections on the Future of the Research Library

*Fri, 20 Dec 2013 07:16:26, ksmithl2@duke.edu, [category: libraries, category: technologies]*

Since September, the Duke University Libraries have been engaging in a set of conversations we are calling a seminar on the future of the research library. Our University Librarian initiated this discussion with the deliberate intent that, in spite of the large size of our staff, we engage in the core activity of a seminar — a gathering of individuals who come together for intensive study and the active exchange of ideas. Such a process has intrinsic value, of course, in the continuing professional development and mutual understanding it fosters in the Libraries' staff. It also is timed to help us be best prepared to welcome a new Provost in 2014, since Duke's Provost over the past fifteen years — the only Provost many of us have known at Duke — will be retiring from that role.

Last week our seminar hosted a talk by Professor Ian Baucom, a Professor in Duke's English department and Director of the [John Hope Franklin Humanities Institute](#). His talk, and the discussion that followed it, really helped me focus my thoughts about the future role of academic libraries, academic librarians and scholarly communications. So I want to use this space, in hopes that readers will indulge this end of the year philosophizing, to share some of those thoughts. These reflections grow out of Ian's discuss of several constellations of issues that are important to universities today and how those "hot" issues might impact the place of libraries in a research university.

Given his role as the Director of an intentionally interdisciplinary center, it is not surprising that that was the first constellation of issues Ian discussed. He pointed out the evolution of the idea of interdisciplinarity over the past few decades, from conversations between disciplines, especially between the Humanities and the Social Sciences, to a more deeply transformative methodological commitment, which has been partly driven by advances in technology and the opportunities they have created. In this environment, Ian talked about the special tools and skills that librarians could bring to teams pursuing interdisciplinary research. Those tools could be technological; they could reflect expertise in the management of data; or they could involve helping to describe the product of a research project, make it findable and usable, and preserve it. The changing role for librarians that this invitation suggests is toward serving as consultants and collaborators in the production of research results.

Ian challenged the Libraries to think about whether our fundamental commitment is to information or to knowledge. This immediately struck me, as I think it was intended to, as a false dichotomy. Libraries are not mere storage facilities for information, nor are they, by themselves, producers of knowledge. Rather, they serve as the bridge that helps students and researchers use information to produce knowledge. That role, if we will embrace it, implies a much more active and engaged role in the *process* of knowledge than has traditionally been accorded to (or embraced by) librarians.

Some of the most exciting ideas for me that Ian discussed were around the notion of civic engagement, which is, of course, another important topic on our campuses these days, especially when the Governors of several states (including our own) have challenged the value of higher education. Ian pointed out that library is often one of the most public-facing parts of a university, and suggested three ways in which this outward-looking aspect of the research library could help the university enhance its civic role. The first — he called it the centrifugal aspect of this role — was to help the university find a public language for the expert knowledge that it produces. As an example of this, I thought of the recent effort

here at the Duke Libraries to get copies of articles that will be the subject of press releases or other news stories into our repository so that the public announcements can link to an accessible version of each article. This is one way we help “translate” that expert knowledge for a wider public.

The second role for libraries in assisting the civic engagement of their parent universities that Ian cited, the centripetal aspect, was to pull the issues that are important to the communities around a university into the campus. This we can do in a variety of ways: everything from exhibits in our spaces to seminars and events that we sponsor. The role here is what Ian called “instigator,” being the focal point on campus where civic issues become part of the academic discourse, having an impact on and being impacted by that expert knowledge that is our fundamental goal and creation.

Finally, the third aspect of civic engagement for academic libraries returns us to the idea of collaboration. In many instances, it is the library that is the point of first contact, or the most logical partner, for collaboration with civic organizations, NGOs, local advocacy groups and public institutions.

Three roles for librarians that move well beyond traditional thinking emerged for me from Ian Baucom’s talk — the librarian as consultant has [long been on my mind](#), and the librarian as collaborator is a natural outgrowth of that. But librarians as translators and as instigators were new to me, and helped to flesh out a vision of what the research library might aspire to in the age of global, digital scholarly communications. In my second post on this event I will turn to issues of globalization and, especially, publishing.

# The Future of Research Libraries, part 2

*Mon, 23 Dec 2013 13:13:31, ksmithl2@duke.edu, [category: uncategorized]*

To finish my thoughts about the Duke University Libraries Seminar on the Future of Research Libraries and the presentation made by Professor Ian Baucom, I want to turn to the final two issues we discussed — globalization and publishing. And I want to be very clear that although I refer to Ian's remarks a lot, these posts are based on my memories of, and conclusions from, what he said; I am solely responsible for anything that seems over-simplified or poorly-reasoned; Ian is much too smart to be blamed for such failings.

Support for the increasingly global mission of universities, including Duke, is a difficult problem for academic libraries. We are accustomed to thinking in terms of collections tied to a physical location, of course. In the digital age, we also are beginning to think of a global digital library; lots of the efforts toward public access and open access are directed toward the goal of a global library of digital resources that is accessible to all. But Ian reminded us that it is wrong to think of this as a clean disjunction. In between these two options, the physical domestic collection and the entirely digital global one, are the satellite campuses that many schools, including NYU (in Singapore) and Duke (in Kunshan), are beginning to operate. As Ian told us, the global university really has three foci — the “original” domestic campus, overseas campuses in diverse parts of the world, and the online campus that is truly global. Universities are stretching out in all of these directions, and libraries will continue to be challenged to provide support for the full spectrum of global education.

One thing I especially liked in Ian's discussion of global education was his approach to MOOCs. Throughout his talk, Ian emphasized the difference between offering a bunch of courses and teaching a curriculum; in a sense this is a version of the distinction between information and knowledge. MOOCs, at this point, are largely collections of classes that individuals can take for personal enrichment and, sometimes, for specific, “one-off” types of credit. But we have yet to see a workable curriculum based on such open online courses, although that may come eventually. Until then, the importance of all three parts of the vision Ian outlined for global education remain important; as we expand globally, we cannot leapfrog over those physical centers for education, because they offer what purely online education as yet does not — a way to pursue an organized and intellectually coherent course of study.

The issue of publication arose in the conversation partly from Ian's emphasis on interdisciplinary study and partly from the discussion of global learning. I specifically asked Ian about the impact of increasingly interdisciplinary research on the publication of scholarship. He responded by talking about his own work in environmental humanities. When he began that collaborative work with climate scientists, he said, there was no obvious outlet for scholarship in this area. Because it defied the traditional niches of scholarship and because it was developing so quickly, traditional publication outlets were unavailable or inappropriate. Over time, outlets for this area of scholarship have developed, but, Ian told us, they are mostly [directly online and openly accessible](#). In short, the needs of rapidly developing interdisciplinary scholarship have caused it to leap over traditional publishing and move directly online. The journals and online centers for this area of scholarship that have developed are very high quality, Ian said, but he reminded us that libraries have an important role to play in this evolution of publication venues that do not participate in the traditional imprimatur process of impact factor and journal branding.

In regard to the global focus of education, Ian made an interesting point about the “flow” of scholarship. As we begin the process of expanding our reach globally, we often think about how to make English-language scholarship more broadly accessible abroad. But scholarly work is already happening in all of

the nations to which we wish to expand; our potential partners are also producing work, and familiarity with that scholarship is likely to be as necessary for successful partnership as their familiarity with American work. So Ian suggested that there was a huge opportunity for libraries to work on “reversing the flow” and beginning to organize to translate major works of contemporary scholarship from other nations into English. Presumably this would require very targeted efforts and extensive collaboration. Indeed, perhaps the best lesson from this suggestion, and from Ian’s entire talk, was that libraries need to have large, even outrageous, ambitions, but also to accept that none of us can realize those ambitions alone — we will need lots of collaborators — and that we must accept small-scale projects as the gateway to large-scale change. As the old union organizing song tells us, many stones can form an arch, but singly none.

Finally, I want to share a reflection I had about how we measure the value of libraries in this age of change and the de-emphasis on physical collections. For years the ARL focused its metrics of quality on the size of those physical collections of books and journals. Some years ago, it moved to looking at expenditures, as a way to account for all the resources that libraries were buying that were not physical and thus not amenable to enumeration. But today, when new and high-quality resources are springing up online that do not offer either a way to be physically counted or a cost that can be tabulated, and especially as libraries themselves begin to “publish” such resources, even expenditures seems an inappropriate metric. What we really need is a way to count readers, to tabulate the differences we have made in the scholarly lives of faculty, staff and the broader public, whether that impact was accomplished through books that were checked out, journal packages that were purchased, open access resources that we have hosted or digital collections that we scan and curate. If librarians want to compete to feel good about our continuing role in the fast-changing world of scholarly communications, we should look at the lives we touch, rather than becoming too attached to the formats and costs of the resources through which we touch them.



# Copyright roundup

*Fri, 27 Dec 2013 08:30:01, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]*

I had thought that my two most recent posts reflecting on the future of research libraries would end the year for this blog. But I find two issues have arisen that I want to comment on. Since they both involve copyright — one is merely my observations and the other involves reporting on a recent court decision — I consider this post a year-end copyright roundup. Yee Haw!

I have [commented before](#) about the campaign that Elsevier has undertaken to send take down notices regarding PDFs of articles they have published that are posted on Academia.edu. At that time, I expressed the hope that the American Association of University Professors would get involved. The AAUP has been very diligent in defending the copyright interests of faculty, correctly perceiving that rights ownership can be an issue of academic freedom. Unfortunately, up till now, at least, this concern of the AAUP has had a huge blind spot — the threat to academic freedom that is posed when copyright is transferred to large commercial interests like Elsevier, usually gratis and on terms dictated by the assignee rather than the author, which do not share the values regarding scholarship that are held by most faculty authors and by the AAUP itself.

Now we have begun to see that this take down campaign from Elsevier has expanded, as we hear that notices to remove posted PDFs are also being sent in large numbers to universities, presumably directed at copies of articles that are posted on the individual profile or research sites of the faculty authors. These authors clearly believe that they have the right to post these articles — probably because they correctly consider the distinction between their final submitted manuscript and the published PDF to be meaningless — and Elsevier and Elsevier's insistence that those articles be removed is a direct attack on research sharing, the advance of scholarship and, therefore, academic freedom. Why does the AAUP remain silent? In the past they have implied that they did not want to interfere with authors' decisions about where to publish. But now we have clear evidence that many authors do not understand the rights situation and their ability to continue their research projects when they assign copyright to Elsevier. On individual campuses we work to educate them, but we desperately need the voice, and the gravitas, of the AAUP to step in and help faculty authors understand the consequences of these publication decisions. Thoughtless assignment of copyright is a grave threat to academic freedom, as Elsevier is working hard to demonstrate, and it is an issue that the AAUP cannot ignore without seeming to condone.

As for campus responses to these take down notices, I want to make one point. These are not ordinary DMCA take down notices; the DMCA, and section 512 of the copyright act that it amended, pretty clearly imagine that take down notices will be sent from the rights holder to remove material posted by some third-party user of an Internet service. They do not contemplate a situation where the actual ownership of the rights might be disputable. But that is the case here, where the "user" who posts the PDF is the original rights holder, the author. Elsevier is sending these notices as a putative assignee. But we know from long experience that publishers are not good at actually completing copyright transfers, faced with publication deadlines and author disregard of the final paperwork. So in this unique situation, we cannot be sure that Elsevier actually does hold the rights on the basis of which they are demanding takedown, and that the authors who posted the work are therefore not entitled to do so. In this situation, simple compliance with the law demands that universities, through their DMCA agents, insist on receiving evidence of a completed copyright assignment — the law requires a written and signed instrument — before they comply with Elsevier's take down notices.

The case I want to comment on also involves the relationship between universities and authors who hold copyright, in this case the authors of dissertations. In *Andrew Diversey v. The University of New Mexico*, which was before the Tenth Circuit Court of Appeals and [decided on December 23](#), we had a direct conflict between a dissertation author and his university. Briefly, Diversey alleged that he had a terrible time with his dissertation committee, finally sent a draft of his thesis to the Dissertation Coordinator for proofreading, and had it “confiscated” by the Graduate Studies Dean. Subsequently, Diversey discovered that copies of his draft had been sent to ProQuest and to two UNM libraries. The story strikes me as bizarre, especially since there is no indication that Diversey received a degree or that his dissertation won formal approval. So it is odd that it was apparently treated as a finished product; there may be more to the story that we do not know. But ultimately, Diversey sued the University of New Mexico for copyright infringement for copying and distributing his dissertation without authorization. His claim was dismissed by the trial court because that court said it was filed after the statute of limitations had run out. But the Court of Appeals reinstated part of the claim, for unauthorized distribution, and sent the case back to the District Court.

The crux of the case is whether the University infringed Diversey’s by making copies and putting them in their libraries. The Court of Appeals finds that it is at least plausible that it did. The Court recognizes Diversey’s copyright in his dissertation, of course, and suggests that any copying or distribution without his permission, even by the University at which he was a student, is infringing. Copies were made, according to the Court, but Diversey had notice of those copies far enough in the past that the statute of limitations had run out on his claim for unauthorized reproduction by the time it was filed. But the Court found that Diversey only became aware of the distribution, by which it means placing copies of the dissertation in the libraries and listing them in a catalog, within the three-year limitations period, so his claim on that alleged infringement should go forward. The Court also found that a fair use defense would not protect UNM in this set of circumstances.

To me this case is a warning to universities and schools that want to retrospectively digitize Doctoral or Masters’ theses and dissertations, and decide to skip the step of seeking permission from the authors. It is perfectly true that libraries can distribute “lawfully made” copies under the doctrine of first sale. But if the copies themselves were unauthorized, so too is the distribution of those copies. In other words, if the only copy that UNM placed in its library was the one Diversey originally submitted, they could have a first-sale defense. But the University clearly made more copies, since they sent one to ProQuest and had at least two copies in their libraries. It is the distribution of these unauthorized copies that the Court of Appeals thinks is possibly infringing. And that situation is very similar, it seems to me, to the making of digital copies of older dissertations and placing them in an institutional repository without permission from the author. I understand that some institutions decide that it is easier to ask forgiveness in this instance instead of permission. But to me that attitude is disrespectful of the authors of these works. And now we have a case that reminds us that that approach can also be expensive.

If an author discovers her dissertation in an institutional repository and is very unhappy about it, she will have three years from the time she either knew or should have known about the unauthorized copy to bring suit. The fact that the institution might remove the copy from distribution once it learns of the objection will not protect them from such a lawsuit if the author is determined. The expense of defending that lawsuit would be very high regardless of the outcome, and even higher if the institution loses or has to settle (which is now very likely for UNM in this case). For these reasons, this case reinforces my long-held belief that systematic digitization of older dissertations or theses is a situation where permission is the better course, since forgiveness might be doubtful and, without it, the cost could be much too high.

# What is, what could have been, and what should be done

*Thu, 02 Jan 2014 10:09:06, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain]*

[NB — Sharp-eyed readers have pointed out correctly that the authors listed in the first paragraph (at the \*) all died in 1963, not 1943. The list should have included Stephan Vincent Benet, Simone Weil, Radclyffe Hall, Beatrix Potter and R.G. Collingwood as those who died in 1943 and whose works, therefore, would be entering the public domain except for the oddities of U.S. law. I apologize for the overly-hasty research that led to the mistake, and am grateful to those who pointed it out.]

January 1st of each year is celebrated by the geeky few who track such things as “Public Domain Day.” That is because the works whose copyrights expired in the previous year officially enter the public domain, through a convention adopted into the copyright laws of most nations, on January 1 of the following year. Thus, on January 1, 2014, works written by authors who died in 1943 (2013 minus 70) should enter the public domain, and do so in most countries. Thus this year should be the beginning of free public use of works written by Robert Frost, C.S. Lewis, Sylvia Plath, W.E.B. DuBois and many others\*.

Unfortunately, the various ways in which Congress revised our copyright law in the U.S. have created a ridiculous anomaly — no published works enter the public domain at all here in America until 2019 (assuming the law is not tinkered with again). That is because under the 1976 Copyright Act, which took effect on January 1, 1978, all works that were already subject to copyright protection at that time, which was any published work that had been published, with copyright notice, after 1922 (1978 minus 56, which was the previous maximum copyright term), were simply given a 95 year term of protection. Thus, in the U.S., no copyrights will expire for published works before January 1, 2019, when works published in 1923 will become PD.

So while many works of authors who died in 1943 became PD in other countries, in the U.S. only **unpublished** works by such authors rose into the public domain. Those unpublished works are subject to the general life plus 70 term of the current U.S. copyright law, even though works published prior to 1978 are not.

That is the situation as it is, and you can read more about it on [this page from Duke’s Center for the Study of the Public Domain](#), as well as this [post on the TechDirt site](#).

To explore even more fully what might have been, the Center for the Study of the Public Domain also provides us with details about [what could have been in the U.S. public domain](#) if we had preserved the 56-year maximum term of protection that was the law prior to 1978. Under that rule, works published in 1956 would be entering the public domain this year, including books by Jack Kerouac, Ayn Rand, Samuel Beckett and, my personal favorite, Margaret and H.A. Rey (if you don’t recognize this pair, think about an inquisitive monkey).

This year, we also received a timely reminder that the public domain is not as automatic as we might think; it requires attention if it is to flourish and be preserved. On December 23, 2013, a judge in the District Court for the Northern District of Illinois issued a [ruling that confirmed](#) the fact that Sherlock Holmes (another favorite literary character of mine) is in the public domain.

Arthur Conan Doyle wrote four Sherlock Holmes novels and fifty-six short stories. All but ten of the stories were published prior to 1923. Nevertheless, the Conan Doyle Estate, Ltd. has continued to demand that anyone using the Sherlock Holmes character, as many authors wish to do, pay for a license. When author Leslie Klinger and his publishers got such a demand, Klinger filed a lawsuit seek a declaratory judgment from the District Court that Sherlock belong to all of us. The Conan Doyle estate argued that the Holmes character continued to evolve and develop right up through the last story, so that the character itself would not enter the public domain until that final story, published in 1927, does (which would be January 1, 2023).

Judge Ruben Castillo of the District Court in Chicago ruled, following substantial precedents, that the character of Sherlock Holmes, as he has been delineated in the four novels and 46 stories that clearly are PD, is also “free as the air for everyone to use.” Only elements of the character that were added anew in those last 10 stories, elements such as Dr. Watson’s second marriage and Holmes’ retirement from his practice as a consulting detective, are still subject to protection. But, according to Judge Castillo, all of the “Pre-1923 Story Elements,” which are more than sufficient for new authors to create stories featuring Holmes, are in the public domain. He rejected the argument from the Conan Doyle Estate that Holmes was such a complex character that the earlier precedents, involving, they said, “flatter” and less richly delineated characters, should not apply. Such a rule, Judge Castillo pointed out, is too nebulous and difficult to apply; he decided to stick with the “increments of expression” rule about which aspects of a character are protected once some stories about that figure rise into the public domain.

So as we reflect on what is the situation regarding the public domain in the U.S., and what might have been, it is also important to recall what needs to be done. There are lots of interested parties out there, like the Conan Doyle Estate, that will keep trying to sell that which should be free. Just because someone offers, or even demands, a licensing transaction does not mean that such a transaction is required. Users, including new creators who are building on work that has gone before (as all do) need to be vigilant and protect their rights, as Mr. Klinger decided to do. We can easily fall into a false but happy belief that the public domain is automatic, a self-executing realm of free stuff. But it is not; it requires attention and often direct action to ensure that our shared culture is fairly available to all without the extra-legal rules and fees that many would apply to narrow the scope of the public domain for the purpose of private gain.

For more detail about the public domain, legal regimes that have impoverished it, and pro-active efforts to protect and expand the canon of works freely available to the public, [reading this article by Jennifer Jenkins](#), Director of Duke’s Center for the Study of the Public Domain, is a great way to cap one’s observance of Public Domain Day.

# Half-lives, policies and embargoes

Wed, 15 Jan 2014 11:28:37, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]

Over the holidays I was contacted by a writer for *Library Journal* asking me what I thought about a [study by Phil Davis](#), which was commissioned and released by the Association of American Publishers, that analyzed the “article half-life” for journals in a variety of disciplines and reported on the wide variation in that metric. The main finding is that this idea of half-life — the point at which an article has received half of its lifetime downloads — varies a great deal from discipline to discipline. The writer asked me what I thought about the study, and about a [blog post on the Scholarly Kitchen](#) in which David Crotty argues that this study shows that the experience of the NIH with article embargoes — that public access after a one-year embargo does not harm journal subscription — cannot be generalized because the different disciplines vary so much. I sent some comments, and the [article in LJ](#) came out early last week.

Since this exchange I have learned that the Davis study is being presented to legislators to prove the point Crotty makes — that public access policies should have long embargoes on them to protect journal subscriptions. It is worth noting that Davis does not actually make that claim, but his study is being used to support that argument in the on-going debate over implementing the White House public access directive. That makes it more important, in my opinion, to be clear about what this study really does tell us and to recognize a bad argument when we see it.

Here is my original reply to the LJ writer, which is based on the fact that this metric, “article half-life,” is entirely new to me and its relevance is completely unproved. It certainly does not, in my opinion, support the much different claim that short embargoes on public access will lead to journal subscription cancellations:

I have to preface my comments by saying that I was only vaguely aware of Davis’ study before you pointed it out. So my comments are based on only a very short acquaintance.

I have no reason to question Davis’ data or his results. My question is about why the particular focus on the half-life of article downloads was chosen in the first place, and my issue is with the attempt to connect that unusual metric with the policy debate about public access policies and embargoes.

As far as I can tell, article half-life tells us something about usage, but not too much about the question of embargoes. The discussion of how long an embargo should be imposed on public access is supposed to focus on preventing subscription cancellations. What I do not see is any connection between this notion of article usage half-life and journal cancellation. It is a big leap from saying that a journal retains some level of usefulness for X number of years to saying that an embargo shorter than X will lead to cancelled subscriptions, yet I think that is the argument that is being made.

Here are two paragraphs from Crotty’s Scholarly Kitchen post:

[snip]“As I understand it, the OSTP set a 12-month embargo as the default, based on the experience seen with the NIH and PubMed Central. The NIH has long had a public access

policy with a 12-month embargo, and to date, no publisher has presented concrete evidence that this has resulted in lost subscriptions. With this singular piece of evidence, it made sense for the OSTP to start with a known quantity and work from there.

The new study, however, suggests that the NIH experience may have been a poor choice for a starting point. Clearly the evidence shows that by far, Health Science journals have the shortest article half-lives. The material being deposited in PubMed Central is, therefore, an outlier population, and many (sic) not set an appropriate standard for other fields.”[end quotation]

What immediately strikes me is the unacknowledged transition between the two paragraphs. In the first he is talking about lost subscriptions, which makes sense. But in the second he is talking about this notion of download half-life. What neither Davis nor Crotty give us, however, is the connection between these half-life numbers and lost subscriptions. In other words, why should policy decisions about embargoes be made based on this half-life number? At best the connection between so-called article half-life and cancelled subscriptions is based on a highly speculative argument that has yet even to be made, much less proved. At worst, this metric is irrelevant to the debate.

My overall impression is that the publishing industry is unable to show evidence of lost subscriptions based on the NIH public access policy (which Crotty acknowledges), so they are trying to introduce this new concept to cloud the discussion and make it look like there is a threat to their businesses that still cannot be documented. I think it is just not the right data point on which to base the discussion about public access embargoes.

A second point, of course, is that even if it were proved that there would be some economic loss to publishers with 6 or 12 month embargoes, that does not complete the policy discussion. The government does not support scientific research in order to prop up private business models. And the public is entitled to make a decision about return on its investment that considers the impact on these private corporate stakeholders but is not dictated by their interests. It may still be good policy to insist on 6 month embargoes even if we had evidence that this would have a negative economic impact on [some] publishers. Government agencies that fund research simply are not obligated to protect the existing monopoly on the dissemination of scholarship at the expense of the public interest.

By the way, Crotty is wrong, in the passage quoted above, to say that there is no evidence that short embargoes do not impact subscriptions other than the NIH experience. The European Commission did a [five-year pilot study](#) testing embargoes across disciplines and concluded that maximum periods of six months in the life sciences and 12 months for other disciplines were the correct embargoes.

In addition to what I said in the long quote above, I want to make two additional points.

First, it bears repeating that Davis’ study was commissioned by the publishing industry and released without any apparent peer-review. Such review might have pointed out that the actual relevance of this article half-life number is never explained or defended. But the publishing industry is getting to be in the habit of attacking open access using “data” that is not subject to the very process that they tell us is at the core of the value that they, the publishers, add to scholarship.

The second point is that I have never heard of any librarian who used article half-life to make collecting or cancellation decisions. Indeed, I had never even heard of the idea until the Davis study was released, and neither had the colleagues I asked. We would not have known how to determine this number even if we had wanted to. It is not among the metrics, as far as I can determine, that publishers offer to us when we buy their packages and platforms. So it appears to be a data point cooked up because of what the publishing industry hoped it would show, which is now being presented to policy-makers, quite erroneously, as if it was relevant to the discuss of public access and embargoes. Crotty says in his post that rational policy should be evidence-based, and that is true. But we should not accept anything that is presented as evidence just because it looks like data; some connection to the topic at hand must be proved or our decision-making has not been improved one bit.

We cannot say it too often — library support for public access policies is rooted in our commitment to serve the best interests of scholarship and to see to it that all the folks who need or could use the fruits of scholarly research, especially taxpayer-funded research, are able to access it. We are not supporting these policies in order to cancel library subscriptions, and the many efforts in the publishing industry to distract from the access issue and to claim, on the basis of no evidence or irrelevant data, that their business models are imperiled are just so many red-herrings.

NB — After this was written I discovered the post on the same topic by Peter Suber from Harvard, which comes to many of the same conclusions and elaborates on the data uncovered by the European Commission and the UK Research Councils that are much more directly relevant to this issue. [You can read his comments here.](#)



# A week of copyright principles

*Mon, 13 Jan 2014 13:51:16, ksmith12@duke.edu, [category: uncategorized]*

Starting today, the Electronic Frontier Foundation is sponsoring Copyright Week, which will last for six days. Each day is dedicated to one of six principles that, EFF asserts, should guide copyright policy and practice. They are, in my opinion, excellent principles, that really connect back to the original purpose of copyright as an engine for cultural growth and development.

Copyright Week begins today, and the first principle is “Transparency.” Transparency is always an important element of public policy, and recently it has been especially threatened by bilateral and multilateral trade negotiations, which take copyright discussions out of the (relatively) public arena of lawmaking and move them to the often quite secret space where a few bureaucrats work out agreements with little regard for the overall public interest and little awareness of consequences of their agreements outside of their limited vision. That kind of negotiation and back room dealing brought us SOPA two years ago, and it is no coincidence that Copyright Week, which will end on the second anniversary of the “great SOPA blackout,” kicks off with the newest SOPA-like threat, the “Trans-Pacific Partnership Agreement” or TPP.

Partners in the Copyright Week program include the American Library Association and the Association of Research Libraries. To get the [ARL’s take on TPP, please read this blog post](#).

The overall schedule for Copyright Week can be found [here, where each day a set of links about the theme for that day](#) will offer readers perspective on the principle for that day. You can also follow the [ARL’s Policy Notes blog](#) for the principles and links. It promises to be an interesting and informative six days; a chance for all of us to learn something and to gain a more comprehensive view of the copyright debates that are going on around us.



# Setting the record straight about Elsevier

Tue, 28 Jan 2014 11:10:28, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: scholarly-publishing]

There has been a lot of attention given to the moves by publishing giant Elsevier to enforce its policy regarding authors' rights to post his or her article on a personal website or in an institutional repository. Since Elsevier began sending take down notices last fall, first to Academia.edu and then to individual universities, it has become well-known that authors are allowed, under their contracts with Elsevier, to post their "final submitted version," which refers to the last version of the article, after peer-review, that is sent to the journal, but not the final published version with whatever copy-editing and formatting that the publisher has added.

This is a difficult distinction for faculty authors to understand. My colleagues and I talk about it all the time with our faculty authors, but they persistently do not see much difference between the two versions, so they sometimes believe that there is little reason to observe the distinction. Publishers think (or at least say publicly) that they add a lot of value to submitted manuscripts, but a great many authors do not see it that way.

Unfortunately, some of the attention that this new strategy from Elsevier has garnered has made the difficulty of explaining what is going on to faculty authors a little more difficult. This [article from \*The Economist\* Called "No Peeking..."](#) is a case in point. The article correctly suggests that this is going to prove a self-defeating tactic for Elsevier, whose desperation to stem the movement toward open access often leads it into foolish decisions. *The Economist*, however, misstates the copyright law in its article in a way that will unfortunately reenforce a common misconception on campuses.

Here are three sentences from *The Economist* article that embody the misconception I am concerned about:

Like journalists writing for a newspaper, academics submitting an article to a journal usually sign contracts which transfer copyright to the publisher.... As the University of California, Irvine, which was on the receiving end of some of the takedown notices, points out in advice to its staff, it is usually only the final version of an article, as it appears in a journal, that is covered by publisher's copyright. There is nothing to stop scientists making earlier versions available.

The problem with the first sentence is that academic authors are really not like journalists. Many journalists are full-time employees of their newspapers, so that their articles are owned by the newspaper from the start, as works made for hire. On the other hand, academic authors are not employees of publishers and their writings are not work for hire. Their rights (as well as those of some free-lance journalist) are entirely governed by the contracts they sign. The important implication of this is that academic authors have much more control over the rights they surrender and retain than do journalists; faculty members can simply refuse to transfer copyright (because they own it unless and until it is transferred in writing) or they can negotiate the exact terms of publication, transferring or licensing some rights and holding on to others.

The bigger issue in this article, however, is in the second and third sentences quoted above, about how the copyright that is transferred to publishers only "covers" the final version of the article. This is a common misconception that is both wrong and dangerous. It is the same misconception that leads

some people to believe that if they re-draw an illustration, chart or table from a copyrighted publication, they do not implicate copyright. But the truth is that a copyright includes any work that is derived from the copyrighted work and is “substantially similar.” When someone wants to use a figure from a published work, they may well be able to do so under fair use, but redrawing the figure, unless it is redrawn into something quite different (which would undermine the purpose), does not alter the copyright situation.

When we turn to the issue of article versions, the situation is the same. Each version is a revision of the original, and the copyright is the same for all these derivatives. When copyright is transferred to a publisher, the rights in the entire set of versions, as derivatives of one another, are included in the transfer. Authors are not allowed to use their post-prints because the rights in that version are not covered in the transfer; they are allowed to use post-prints only because the right to do so, in specified situations, is licensed back to them as part of the publication agreement.

Once a copyright transfer has been signed, all of the rights that the author may still have are because of specific contractual terms, which are usually contained in the transfer document itself. In short, these agreements usually give all of the rights under copyright to the publisher and then license back very small, carefully defined slivers of those rights back to the author. One of those slivers is often, but not always, the right to use a submitted version, or post-print, in carefully limited ways. For example, many publishers allow posting of the submitted version only on defined websites, usually a personal site or institutional repository. Often the contracts also allow posting of the submitted version only after some lapse of time. These restrictions would not make sense or be enforceable IF the author retained some kind of copyright in earlier versions, as *The Economist* implies. But they do not; they have only, and exactly, what the contract gives back to them.

One important lesson to be gained from this correction of the language of *The Economist* article is that publication contracts are extremely important. They entirely determine what an author can do with his or her own work in the future. For many academics, signing such agreements is a very bad idea; they should be negotiated, either to make them licenses to publish, which allows the author to retain her copyright, or to be certain that the rights that are licensed back are broad enough and flexible enough to permit the future uses the author wants. Before the transfer, the author has a good deal of leverage to negotiate these agreements, but afterward she has very little. So it is vital to pay attention to the agreement itself and not rely on a false sense of security based on a misconception of how copyright works.

Another point to learn from this situation is that the whole idea of article “versions” is artificial. It has been developed primarily by publishers in order to make a claim that they add substantial value to the final published version, which may or may not be true, depending on the article and the publisher. Another marketing advantage that publishers get from this fabricated distinction is the ability to claim that they support author rights and reuse of articles to promote better access, while still retaining the ability to slap down authors who use their own articles in ways the publishers have not pre-approved. As my colleague Will Cross has put it, “This versioning is a creation of publishers to reenforce the sense that they are following the academic [“gentleman’s agreement”](#) that Elsevier has been breaking here.”

[Hat tip to Will Cross and to Lisa Macklin of Emory, who discussed the implications of this particular mistake with me by e-mail and provided some ideas incorporated herein. Will qualified his statement quoted above by acknowledging that pre-prints, especially, have a longer history, but the use of these distinctions as contractual dividing lines is related to recent pressures on publishing.]

# Its the content, not the version!

*Wed, 05 Feb 2014 09:12:50, ksmith12@duke.edu, [category: uncategorized]*

My last post about copyright assignment and different versions of a scholarly article set off a small controversy, some of which can be found in the comments to that post and some of which took place on other social media venues. Yesterday Richard Poynder posted to the Lib-License list about this discussion, and I felt compelled to respond, since it seems clear this is not an isolated misunderstanding that will fade away.

Here is part of Richard's post, which summarizes the discussion:

Last week, the Scholarly Communications Officer at Duke University in the US, Kevin Smith, published a blog post challenging a widely held assumption amongst OA advocates that when scholars transfer copyright in their papers they transfer only the final version of the article.

This is not true, Smith argued.

If correct, this would seem to have important implications for Green OA, not least because it would mean that publishers have greater control over self-archiving than OA advocates assume.

However Charles Oppenheim, a UK-based copyright specialist, [believes that OA advocates](#) are correct in thinking that when an author signs a copyright assignment only the rights in the final version of the paper are transferred, and so authors retain the rights to all earlier versions of their work, certainly under UK and EU law. As such, they are free to post earlier versions of their papers on the Web.

And here is the response that I just sent to the LibLicense list, in which I focus on copyright as protection over expressive content, rather than arbitrary distinctions between different versions of that content:

I had really hoped I could ignore this rather muddled controversy, mostly due to a lack of time to address it. But a tweet from Nancy Sims, of the University of Minnesota, made me realize that my original post used slightly careless language that may contribute to the confusion. So I feel I should set that straight, and respond to the whole business.

I wrote that different versions of an article were derivatives of one another. That is probably a defensible position, but Nancy made the point much clearer — the different versions are still the same work, so subject to a single copyright.

Throughout this discussion, the proponents of the position that copyright is transferred only in a final version really do not make any legal arguments as such, just an assertion of what they wish were the situation (I wish it were too). But here is a legal point — the U.S. copyright law makes the difficulty with this position pretty clearly in section 202 when it states the obvious principle that copyright is distinct from any particular material object that embodies the copyrighted work. So it is simply not true to say that version A has a copyright and version B has a different copyright. The copyright is in the expressive content, not in different versions; if all embody substantially the same expression, they are all the one

work, for copyright purposes, because the copyright protects that expressive content. Hence Nancy's perfectly correct remark that the different versions are the same work, from a copyright perspective.

Part of the point I wanted to make in my original post is that this notion of versions is, at least in part, an artificial construction that publishers use to assert control while also giving the appearance of generosity in their licensing back to authors of very limited rights to use earlier versions. The versions are artificially based on steps in the publication permission process (before submission, peer-review, submission, publication), not on anything intrinsic to the work itself that would justify a change in copyright status. If we look at how articles are really composed — usually by composing one file and then editing it repeatedly, it is easy to see how artificial, in the sense of unrelated to content, the distinctions are. How much time must elapse before a revision is a different version? If I do some revisions, then go have a cup of tea before returning to make other revisions, have I created two different “versions” entitled to separate copyright protection? The question is absurd, of course, and shows how unworkable the idea of different copyrights in different versions of the same work would be.

It has been said that no publisher makes the claim I am here suggesting. But if we look at actual copyright transfer agreements it is easy to see that they do. The default policies for Wiley, for example tell authors that they can archive a pre-print and archive a post-print, subject to certain conditions, including rules about the types of repositories that the archiving can take place in and a limitation to non-commercial reuse. If an author transfers rights only in the final version, how can Wiley make restrictions on the use of these earlier versions? The better — indeed the only logical — interpretation is that the copyright that is transferred covers the work as a whole, which is the nature of copyright, and that Wiley then licenses back to authors certain rights to reuse different versions. Those version rights are based on what Wiley wants to allow and to hold on to, not on any legal distinction between the versions. Elsevier's policies are similar — they allow the preprint to be used on any website, the post-print to be self-archived on a scholarly website ONLY if the institution does not have a mandate and with acknowledgement of the publisher, and do not allow any archiving of the final version. Again, all of this is grounded on a claim that a copyright that is inclusive of the different versions, because they are the same work, has been transferred to Elsevier.

Let's imagine what would happen if a dispute ever arose over a use of an earlier version of an article after the copyright had been transferred. A court would be asked to determine if the use of the earlier version was an infringement of the copyright held by the assignee. Courts have a standard for making this determination; it is “substantial similarity.” So if the re-used version of the work was substantially similar to the work in which the copyright was assigned — that language is itself bound up in the misunderstanding I am trying to refute — a court would probably find infringement. This has been the case in situations where the works were much more different than two versions of a scholarly article. George Harrison, for example, was found to have infringed the copyright in the song “He's So Fine” when he wrote “My Sweet Lord,” even though the court acknowledged that it was probably a case of unconscious borrowing (see *Bright Tunes Music v. Harrisongs Music*, 420 F. Supp. 177, S.D.N.Y. 1976). And the author of a sequel novel to “Catcher in the Rye” was held to have infringed copyright in Salinger's novel even though they told very different stories, due to similarities in characters and incidents (*Salinger v. Colting*, 607 F. 3d 68, 2d Cir. 2010). If these very different “versions” of the same work were held to be copyright infringement, how is it possible that two versions of the same scholarly article could have separate and distinct copyrights?

In many ways I wish it were true that each version had a distinct copyright, so that transfer of the rights in one version did not impact reuse of the earlier version. That situation would make academic reuse much easier, and it would conform to a basic sense that most academics have that they still “own”

something, even after they assign the copyright. But that position is contrary to the very foundations of copyright law (and not just U.S. law), which vests rights in the content of expression, not in versions that represent artificial points in the process of composition or publication. And much as this mistaken idea may be attractive, it has dangerous consequences; it gives authors a false sense that the consequences of signing a copyright transfer agreement are less draconian than they really are. Instead of plying our faculty with these comforting illusions, we need to help them understand that copyright is a valuable asset that should not be given away without very careful thought, precisely because, once it is given away, all reuse of the expression in the article, regardless of version, is entirely governed by whatever rights, if any, are licensed back to the author in the transfer agreement.

# So what about self-archiving?

*Thu, 06 Feb 2014 14:23:46, ksmithl2@duke.edu, [category: authors-rights, category: licensing, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

There is a persistent problem with polemics. When writing to address someone else's position with which one disagrees, it is easy to lose sight of the proverbial forest for the trees.

In my previous two posts, I was addressing a misunderstanding that I am afraid might lead authors to be less attentive and assertive about their publication contracts than they should be. The specific issue was whether or not it is feasible to maintain that a copyright is transferred only in a final version of a scholarly article, leaving copyright in earlier versions in the hands of the author. I argued that this was not the case, that the distinction between versions is a construct used by publishers that has little legal meaning, and that author rights that do persist in earlier versions, as they often do, are created by the specific terms of a copyright transfer agreement (i.e., they are creatures of a license). These points, which I believe are correct, prompted a number of people to get in touch with me, concerned about how these specific "trees" might impact the overall forest of self-archiving policies and practices.

So now I want to make several points that all address one conclusion; this argument about the nature of a copyright transfer does not necessarily have any significant impact on what we do to enhance and encourage self-archiving on our campuses. Most of the practices I am aware of already take account of the argument I have been making, even if they are not explicit about it.

On the LibLicense list today, Professor Steven Harnad, who is a pioneer in the movement to self-archive scholarly papers, [posted a 10-point strategy](#) for accomplishing Green open access. Essentially, he points out that a significant number of publishers (his number is 60%) allow authors to self-archive their final submitted versions of their articles, and that those who have retained this right should exercise it. Elsevier is one such publisher, about which more later. Harnad argues that there are other strategies available for authors whose copyright transfer agreements do not allow self-archiving of even the final manuscript. One option is to deposit the manuscript in a repository but embargo access to it. At least that accomplishes preservation and access to the article metadata, and it facilitates fulfillment of individual requests for a copy. Another option is to deposit a pre-print (the version of the article before peer-review) in a pre-print repository, which is a solution that has long worked well in specific disciplines like physics and computer science.

All of these strategies are completely consistent with the point I have been making about copyright transfer agreements. Harnad's model recognizes that copyright is transferred (perhaps improvidently) to publishers, and is based on authors taking full advantage of the rights that are licensed back to them in that transaction. This makes perfect sense to me and nothing I have written in my previous two posts diminishes from this strategy.

One of the questions I have received a couple of times involves campus open access policies and how they affect, or are affected by, copyright transfers. These policies often assert a license in scholarly articles, so the question is essentially whether that license survives a transfer of copyright.

It is a basic principle of law, and common sense, that one cannot sell, or give away, more than one owns. So if an author has granted a license to her institution before she transfers her rights to a publisher, it seems clear that the license should survive, or, to put it another way, that the rights that are transferred to the publisher are still subject to this prior license. There was an [excellent article written in 2012 by](#)

[law professor Eric Priest](#) about this situation, and his conclusion is “that permission mandates can create legally enforceable, durable nonexclusive licenses.” The article provides an extensive analysis of the legal effect of this “Harvard-style” license, and is well worth being read in its entirety by all who are interested in the legal status of Green open access.

An additional wrinkle to the status of a prior license is provided by section 205(e) of the copyright law, which actually addresses the issue of “priority between conflicting transfer of ownership and nonexclusive license.” This provision basically affirms what I have said above, that a license granted prior to a transfer of copyright survives the transfer and prevails over the rights now held by the transferee, IF it is evidenced by a written instrument. Because of this provision, some schools that have a license that is created by an open access policy also get a document from the author at the time of OA deposit that affirms the existence of that license. Such documentation helps ensure the survival of a policy-based license even after the copyright is later transferred to a publisher.

Even when we decide that a license for Green open access exists and has survived a copyright transfer, however, we still have a policy decision to make about how aggressively to assert that license. Many institutional practices look to the terms of the copyright transfer and try to abide by the provisions found therein, usually relating to the version that can be used and when it can be made openly accessible. They do this, I think, to avoid creating an uncomfortable situation for the authors. Even if legally that license they granted would survive the transfer of rights, if a conflict with the publisher developed, the authors (whom we are, after all, trying to serve) would be in a difficult place. So my personal preference is to conform our practice to reasonable publisher policies about self-archiving and to work with authors to get unreasonable policies changed, rather than to provoke a dispute. But this is a policy matter for specific institutions.

Finally, I want to say a couple of things specifically about Elsevier, since it was Elsevier’s take down notices directed against author self-archiving that began this series of discussions.

Elsevier’s policies permit authors to self-archive the final manuscript version of an article but not the published version, and, as far as I know, all of its take down notices were directed against final published versions on institutional or commercial websites. So it is true that in my opinion, based on the analysis I have presented over the past week, that Elsevier is legally justified in this take down campaign. It may well be a stupid and self-defeating strategy — I think it is — but they have the legal right to pursue it. Authors, however, also have the legal right, based on Elsevier’s policies that are incorporated into their copyright transfer agreements, to post an earlier version of the articles — the final author’s manuscript(s) — in place of these final published versions. So I hope that every time a take down notice from Elsevier that is directed against the author of the work in question is received, the article that is taken down is replaced by a final manuscript version of the same content.

As many know, Elsevier also has a foolish and offensive provision in its current copyright transfer agreement that says that authors are allowed to self-archive a final manuscript version of their article UNLESS there is an institutional mandate to do so. As I have said before, this “you may if you don’t have to but not if you must” approach is an unjustifiable interference with academic freedom, since it is an attempt to tie faculty rights to specific policies that the faculty themselves adopt to further their own institutional and academic missions. Elsevier should be ashamed to take this stance, and our institutions that value academic freedom should protest. But based on what has been said above, we can also see how futile this approach really is. If the institution has a policy-created license, that license probably survives the copyright transfer, as Eric Priest argues. In that case, the denial of a self-archiving right only in cases where a license exists is meaningless precisely because that license does exist; authors could

self-archive based on the license and do not need the grant of rights that Elsevier is petulantly withholding. I said above that institutions should consider whether or not they want to provoke disputes by relying on the prior existence of a license to self-archive. Elsevier, however, seems to have decided to provoke exactly that dispute with this provision, and they are even more unwise to do so since it is likely to be a losing proposition for them.



# What week is it? Fair Use week of course!

Fri, 21 Feb 2014 13:24:30, ksmithl2@duke.edu, [category: fair-use, category: libraries]

Next week Fair Use Week will be observed on a number of university campus. I want to use this short post to bring some resources to my readers' attention, make a comment on why we should all celebrate fair use week, and provide a foretaste of my contribution to the festivities, which will appear in a different forum.



Harvard announces Fair Use Week with an homage to Justice Joseph Story, who originated the concept in 1841

In the poster above, Fair Use Week at Harvard is connected directly to the origins of this unique aspect of American copyright law, through a statue of Justice Joseph Story, who first defined what we came to call fair use in an 1841 case involving the letters of George Washington. It is fitting that that case involved a scholarly work, a life of Washington, because fair use was then and still is today one of the most important underpinnings of scholarship. We argue about its scope sometimes, but we rely on it everyday. The most basic relationship in academic writing, the quotation of a scholar in another scholar's work, is a form of fair use that is so central and natural to scholarship that we forget what it really is and the body of law that it depends on. Fair Use Week is worthy of celebration on our campuses because it is a reminder that this aspect of copyright law is a *sine qua non* for scholarship and has been for a great many years.

Two institutions that I know of will be featuring fair use information and opinion in blogs, and I wanted to draw these resources to the attention of readers.

Ohio State University hosts a ["Copyright Corner" blog](#) that has been providing basic information about fair use all month long. During the next week it would be worthwhile for readers to review what has been written there.

At Harvard, a new blog called [Copyright at Harvard Library](#) will feature posts from invited guests for Fair Use Week. I hope readers will keep up with that blog, partly because one of those posts — on Tuesday, I am told — will be a contribution from me. And I thought I would offer here a quick summary of what I will say in some detail over there.

My post focuses on a case decided by the Second Circuit Court of Appeals last month. It was an odd case, involving a lawsuit brought over a surreptitious recording of a conference call made by the business news service Bloomberg. The recording was distributed to Bloomberg subscribers and the company that held the call sued, claiming copyright infringement. There are two fascinating issues in the case, I think. The first involves that fundamental requirement for a copyright, fixation in a tangible medium of expression. Since they recorded the phone call live, not from some prior fixation, Bloomberg tried to defend themselves by saying that there was no copyright in the call for them to infringe. The second issue, of course, was fair use. Both the lower court and the Second Circuit ultimately decided the issue based on fair use, and the analysis that the Appellate Court especially applied is really fascinating. In my post I try to explain how extraordinary the analysis is, and why it has potential implications for the still-pending appeal in the Georgia State University copyright case and its fair use defense.

I hope that is enough to whet your appetite and send you to the Harvard Fair Use Week blog repeatedly this week, to read my contribution and those from Kenny Crews, Krista Cox and others.

# Please propose to us

*Fri, 28 Feb 2014 14:23:37, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: libraries, category: scholarly-publishing, category: technologies]*

Later this year, the [first in a new series of Scholarly Communication Institutes](#) will be held here in the Research Triangle and we are looking for proposals from diverse and creative teams of people who are interested in projects that have the potential to reshape scholarly communications.

Last year the Andrew W. Mellon Foundation funded a three-year project to continue the long-running Scholarly Communications Institute which has previously been held at the University of Virginia. Starting in November, the new SCI will be hosted by Duke in close collaborations with UNC Chapel Hill, NC State University, North Carolina Central University and the Triangle Research Libraries Network. This new iteration of the SCI will benefit, we believe, from the extraordinary depth and diversity of resources related to innovation in scholarly communications here in the Triangle, and it will also take on a new format, in which participants will have a major role in setting the agenda each year.

Starting this year — starting right now! — the SCI invites applications from working groups of 3 — 8 people that are organized around a project or problem that concerns scholarly communications. These working groups can and should be diverse, consisting of scholars, librarians, publishers, technologists and folks from outside academia (journalist? museums? non-profits?). We hope that proposals will be very creative about connections, and include people that would like to work together even if they have not previously been able to do so.

The SCI Advisory panel will select 3 to 5 of these working group proposals and cover the costs for those teams to travel to the Triangle and spend four days together in Chapel Hill in a setting that is part retreat, part seminar, part development sprint and part un-conference. We want these groups to work together and to interact. The groups will, we hope, jump-start their own projects and “cross-pollinate” ideas that will advance and challenge each others projects and discussions.

The theme for the 2014 SCI is Scholarship and the Crowd. It will be held November 9-13 at the Rizzo Center in Chapel Hill, NC. **Proposals are due by March 24.**

The goal of the SCI is not to schedule breakthroughs but create conditions that favor them. The Working Groups selected will set the agenda and define the deliverables. The Institute will offer the space, the environment and the network of peers to foster creative thinking, with the hope of both advancing the specific projects and also developing ideas and perspectives that can give those projects a broader potential to influence the landscape of publishing, digital humanities and other topics related to scholarly communications.

If you or someone you know might be interested in developing a proposal for this first Triangle-based SCI, you will find the call for proposals and an FAQ at [trianglesci.org](http://trianglesci.org).

# Walking the talk

*Fri, 07 Mar 2014 07:54:25, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing, category: technologies, category: uncategorized]*

All of the presentations at the SPARC Open Access meeting this week were excellent. But there was one that was really special; an [early career researcher named Erin McKiernan](#) who brought everyone in the room to their feet to applaud her commitment to open access. We are sometimes told that only established scholars who enjoy the security of tenure can “afford” to embrace more open ways to disseminate their work. But Dr. McKiernan explained to us both the “why” and the “how” of a deep commitment to OA on the part of a younger scholar who is not willing to embrace traditional, toll-access publishing or to surrender her goals of advancing scholarship and having an academic career.

Erin McKiernan is a Ph.D from the University of Arizona who is now working as a scientist and teacher in Latin America. Her unique experience informs her perspective on why young scholars should embrace open access. Dr. McKiernan is a researcher in medical science at the National Institute of Public Health in Mexico and teaches (or has taught) at a couple of institutions in Latin America. For her, the issue is that open access is fundamental to her ability to do her job; she told us that the research library available to her and her colleagues has subscriptions to only 139 journals, far fewer than most U.S. researchers expect to be able to consult. Twenty-two of that number are only available in print format, because electronic access is too expensive. This group includes key titles like *Nature* and *Cell*. A number of other titles that U.S. researchers take for granted as core to their work — she mentioned *Nature Medicine* and *PNAS* — are entirely unavailable because of cost. So in an age when digital communications ought to, at the very least, facilitate access to information needed to improve health and treat patients, the cost of these journals is, in Dr. McKiernan’s words, “impeding my colleagues’ ability to save lives.” She made clear that some of these journals are so expensive that the choice is often between a couple of added subscriptions or the salary of a researcher.

This situation ought to be intolerable, and for Dr. McKiernan it is. She outlined for us a personal pledge that ought to sound quite familiar. First, she will not write, edit or review for a closed-access journal. Second, she will blog about her scientific research and post preprints of her articles so that her work is both transparent and accessible. Finally, she told us that if a colleague chose to publish a paper on which she was a joint author in a closed-access journal, she would remove her name from that work. This is a comprehensive and passionately-felt commitment to do science in the open and to make it accessible to everyone who could benefit from it — clinicians, patients and the general public as well as other scholars.

Listening to Dr. McKiernan, I was reminded of a former colleague who liked to say that he “would rather do my job than keep my job.” But, realistically, Dr. McKiernan wants to have a career as a teacher and research scientist. So she directly addressed the concerns we often hear that this kind of commitment to open access is a threat to promotion and tenure in the world of academia. We know, of course, that some parts of this assertion are based on false impressions and bad information, such as the claim that open access journals are not peer-reviewed or that such peer-review is necessarily less rigorous than in traditional subscription journals. This is patently false and really makes little sense — why should good peer-review be tied to a particular business model? Dr. McKiernan pointed out that peer-review is a problem, but not just for open access journals. We have all seen the stories about growing retraction rates and gibberish articles. But these negative perceptions about OA persist, and Dr. McKiernan offered concrete suggestions for early-career researchers who want to work in the open and also get

appropriate credit for their work. Her list of ideas was as follows (with some annotations that I have added):

1. Make a list of open access publication options in your particular field. Chances are you will be surprised by the range of possibilities.
2. Discuss access issues with your collaborators up front, before the research is done and the articles written.
3. Write funds for article processing charges for Gold open access journals into all of your grant applications.
4. Document your altmetrics.
5. [Blog about your science](#), and in language that is comprehensible to non-scientists. Doing this can ultimately increase the impact of your work and can even lead sometimes to press coverage and to better press coverage.
6. Be active on social media. This is the way academic reputations are built today, so ignoring the opportunities presented is unwise.
7. If for some reason you do publish a closed-access article, remember that you still have Green open access options available; you can self-archive a copy of your article in a disciplinary or institutional repository. Dr. McKiernan mentioned that she uses [FigShare](#) for her publications.

The most exciting thing about Erin McKiernan's presentation was that it demolished, for many of us, the perception of open access as a risky choice for younger academics. After listening to her expression of such a heartfelt commitment — and particularly the pictures of the people for whom she does her work, which puts a more human face on the cost of placing subscription barriers on scholarship — I began to realize that, in reality, OA is the only choice.

# More than meets the eye

Tue, 18 Mar 2014 10:32:51, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: scholarly-publishing]

When I first saw the [story about the conflict](#) between the Social Science History Association (SSHA) and Duke University Press (DUP), I thought I had best not comment about it. But since then a number of my colleagues have gotten in touch with me and also made comments about the case that miss some essential elements, in my opinion. So I decided I will express my opinion about the dispute thus far, which is that there is probably no good outcome to this case.

Let me start by saying, however, that even though I work for Duke and specialize in copyright issues, I have absolutely no involvement in this case and no “insider” information. As Will Rogers said, “all I know is what I read in the papers.” What I say here is my own opinion based on those reports and nothing more.

The basic facts are easy to restate. The SSHA has informed DUP that it wants to end its long-standing association and look for a different publisher for its flagship journal, *Social Science History*. The Press, however, asserts that language in their original contract means that the SSHA can stop participating in the journal, but cannot remove it from the control of DUP.

The first point I would make about this dispute is that it involves a specific piece of contract language that is probably unusual. For that reason I think some of the comments about how this case might determine the future for lots of other society journals are exaggerated. My guess is that this case will eventually be resolved through an interpretation of that specific language and thus, even if there is a court decision instead of a settlement, it will not have too much of a ripple effect.

Most of the comments I have seen (from librarians and academics) have assumed that Duke University Press is the bad guy here, trying to wrest control of a scholarly journal out of the hands of scholars. While I do not intend to mount a defense of DUP here, I do want to suggest that there is more to this case than a good v. evil argument about academic freedom. This is a business disagreement, and regardless of which side wins, in my opinion, it will probably not be a good outcome for scholarship.

To understand a lawsuit, it is always a good practice to ask why the plaintiff decided to file the litigation in the first place. A commenter on the *Chronicle* story linked above suggests that it is hard to understand in this case, since he believes the results could not justify the costs. But surely the SSHA thought it was worthwhile, and a little deeper reflection suggests why. In their statement, the SSHA explains that they wanted to “assess the open market” to find out what *Social Science History* is “worth.” That should tell us pretty clearly that the SSHA wants to shop the journal around to the big commercial publishers in order to get a big payout to the Association. Other societies have done it before, and it seems clear that the SSHA wants to cash in on its journal. So the reason the lawsuit is worth the expense is that the SSHA has expectations of perhaps hundreds of thousands of dollars in profit if they can sell their “brand name” journal to Wiley or Sage.

By the way, this is why the society would not be satisfied to simply walk away and start up a new journal to compete with a continuing *Social Science History* published by DUP, as that same commentator suggests. As I said, this is a business dispute, and the key asset at issue is the brand of the journal, its “goodwill” as it is called in economic valuations. Presumably no large commercial press would be willing to pay big money for a new start-up that the SSHA might launch if it lost control over *Social Science*

*History*. The marketing and the value for a new purchaser depends on that well-established title being on the auction block.

So what will be the result if the SSHA wins this lawsuit or gets control over the title in a settlement? I think the inevitable result will be a sale to a large commercial publisher and subsequently much higher subscription rates for libraries and other subscribers. In previous cases where a society has sold its journal or journals to a big publishers, we have seen prices increase by as much as three or four hundred percent, especially if the journal has had a fairly moderate price to begin with (I have no idea about the current subscription price for *Social Science History*). Nor do I think that a win by the SSHA would necessarily be a win for academic freedom or for keeping scholarship in the hands of scholars. If the journal is sold to a large publisher, experience suggests that the scholars who make up the society will have less control over it than they did before and that the quality of the journal will decline. But lots of money will potentially flow into the SSHA coffers.

What happens if, on the other hand, Duke University Press wins the case or otherwise retains control over the journal? In my opinion, DUP has taken the stand that it has in large part to defend the value of its journal list against the loss of one of its premier titles. So if they win, at least their journal package will not lose value. But this is still probably not a good outcome, since the journal will be divorced from its roots and from the scholarly community that has made it a valuable brand in the first place. As several people have suggested, DUP might have a hard time finding top scholars in the field who would be willing to edit the journal or review for it if it is severed from its connection to their scholarly society. So while its value for DUP would be preserved initially, I think a decline in quality and in value over time is inevitable.

This is why I find it impossible to root for either side in this dispute (even though I usually root for Duke teams). To me, this case is an object lesson in why scholarship should not be treated as a commodity around which commercial value, and the disputes that accompany such value, accrues. The radical distinction between the “gift economy” in which individual scholars work, giving away their most precious intellectual assets to publishers without remuneration for the sake of the scholarly mission, and the commercial economy in which publishers work, and to which some societies aspire, was never more clear. Whoever wins this case, the scholars who donate their labor as authors, editors and reviewers for this journal will be the long-term losers. And the only way to change that situation is to radically rethink the way scholarship is supported and disseminated. We need new business models, focused on open access and better ways to support the scholarly mission, while all this dispute offers us is a fight over the way the same old traditional pie of subscription money is sliced.

# Attacking academic values

Thu, 27 Mar 2014 14:08:42, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]

A new thing started happening here at Duke this week; we began getting inquiries from some faculty authors about how to obtain a formal waiver of our faculty open access policy. We have had that policy in place for over three years, but for the first time a single publisher — the Nature Publishing Group — is telling all authors at Duke that they must obtain a waiver of the policy before their accepted articles can be published. It is not clear why NPG suddenly requires these waivers after publishing many articles in the past three years by Duke authors, while the policy was in force and without waivers.

Indeed, the waivers are essentially meaningless because of the way Duke has implemented its open access policy. When the policy was adopted unanimously by our Academic Council in March 2010, the statement in favor of openness was pretty clear, but so was the instruction that implementing the policy not become a burden to our faculty authors. So throughout the ensuing years we have tried to ensure that all archiving of published work in our repository be done in compliance with any publisher policies to which our authors have agreed. NPG allows authors to archive final submitted manuscripts after a six month delay, so that is what we would do, whether or not the author sought a policy waiver. But suddenly that is not good enough; Nature wants a formal waiver even though it will have no practical effect. The demand seems to be an effort to punish authors at institutions that adopt open access policies.

There are some comical aspects to this sudden requirement for waivers. As I said, it seems to have taken NPG three years to figure out that Duke has an open access policy, even though we have made no secret of the fact. Even more oddly, the e-mail that our faculty authors are getting from NPG lists nine schools from whose faculty such waivers are being required; apparently it was only four schools until recently. But there are over thirty institutions with faculty-adopted OA policies in the U.S. alone. Some of the largest schools and the oldest policies have not yet showed up on Nature's radar; one wonders how they can be so unaware of the scholarly landscape on which their business depends. NPG looks silly and poorly-informed, frankly, in the eyes of the academic authors I have spoken to.

In addition to making NPG look foolish, this belated demand for waivers has had positive effects for open access on our campus. For one thing, it simply reminds our authors about the policy and gives us a chance to talk to them about it. We explain why Nature's demand is irrelevant and grant the waivers as a matter of course, while reminding each author that they can still voluntarily archive their work in compliance with the rights they have retained (which is the same situation as without the waiver). I suspect that this move by NPG will actually increase the self-archiving of *Nature* articles in our repository.

Another effect of these new demands is that open access and the unreasonable demands of some commercial publishers has gotten back on the radar of our senior administrators. Our policy allows the Provost to designate someone to grant waivers, and, in figuring out who that would be, we had a robust conversation that focused on how this demand is an attack on the right of our faculty to determine academic policy.

This last point is why I have moved, in the past few days, from laughing at the bumbling way NPG seems to be fighting its battle against OA policies to a sense of real outrage. This effort to punish faculty who have voted for an internal and perfectly legal open access policy is nothing less than an attack on one of



the core principles of academic freedom, faculty governance. NPG thinks it has the right to tell faculties what policies are good for them and which are not, and to punish those who disagree.

As my sense of outrage grew, I began to explore the NPG website. Initially I was looking to see if authors were told about the waiver requirement upfront. As far as I can tell, they are not, in spite of rhetoric about transparency in the [“information for authors”](#) page. The need for a waiver is not even mentioned on the checklist that is supposed to guide authors through the publication process. It seems that this requirement is communicated to authors only after their papers have been accepted. I suspect that NPG is ashamed of their stratagem, and in my opinion they should be. But as I looked at NPG policies, and especially its [License to Publish](#), my concern for our authors grew much deeper.

Two concerns make me think that authors need to be carefully warned before they publish in an NPG journal.

First, because this contract is a license and tells authors that they retain copyright, it may give authors a false sense that they are keeping something valuable. But a careful reading shows that the retention of copyright under this license is essentially a sham. The license is exclusive and irrevocable, and it encompasses all of the rights granted under copyright. It lasts for as long as copyright itself last. In short, authors are left with nothing at all, except the limited set of rights that are granted back to authors by the agreement. This is not much different than publishing with other journals that admit up front that they require a transfer of copyright; my concern is that this one is dressed up as a license, so authors may not realize that they are being just as completely shorn of their rights as they are by other publishers.

My bigger concern, however, is found in clause 7 of the NPG “license,” which reads in its entirety:

The Author(s) hereby waive or agree not to assert (where such waiver is not possible at law) any and all moral rights they may now or in the future hold in connection with the Contribution and the Supplementary Information.

I don’t think most publishers require authors to waive moral rights (I have actually added them in to a publication contract), and insisting on doing so is a serious threat to core academic values. Moral rights are recognized by most countries of the world (including the UK, where NPG has its corporate offices) and usually include two basic rights — the right of attribution and the right to preserve the integrity of one’s work. The United States is something of an outlier in that we do not have a formal recognition of moral rights in our copyright law, although we always assert that these values are protected by other laws. But my point here is to wonder why NPG requires all of its authors to waive their right of attribution. This is not an incidental matter; the clause is carefully structured to attempt to get authors even from the countries that do not allow the waiver of moral rights — they are considered that important — still to promise not to assert those rights (whether or not that would be enforceable in those countries). Nature actively does not want its authors to be able to insist that their names always be associated with their work. Why? Does NPG imagine reusing articles it is given to publish in other ways, without providing proper attribution? If this seems like a remote possibility, it remains the only conceivable reason that NPG would insert this bizarre clause.

So this week I discovered two ways in which Nature Publishing Group is actively attacking core academic values. First, by trying to interfere in academic policy decisions made through independent faculty governance processes. Second, by trying to exempt themselves from the core principle of scholarship that scholars should get credit for the work they do. Authors publish with *Nature* because they believe that the brand enhances their reputation. But by giving NPG the ability to disassociate their work from their name, that value of the *Nature* brand is lost. Why would any author agree to that?

Starting with those silly demands for a waiver of the open access policy, I discovered a much deeper threat being posed to our faculty authors. With each waiver request I now have to have a conversation with all authors who publish with NPG. I will use those conversations as an opportunity to encourage self-archiving. But I now know that I also must warn authors that by signing the NPG license they are giving up the most precious thing they have — the right to get credit for their work. I hope many of our authors will reconsider signing that license unaltered. Since NPG has singled us out, I will now be singling out NPG for its especially egregious attack on fundamental academic values.

# Nimmer on infringement 2.0

*Sun, 30 Mar 2014 19:48:32, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: international-ip]*

I was reminded once again of Mark Twain's comment — "Only one thing is impossible for God: to find any sense in any copyright law on the planet" — as I listened to [Professor David Nimmer](#) deliver the [annual Frey Lecture](#) in Intellectual Property at the Duke Law School this week. As the person now responsible for revising and updating the seminal treatise *Nimmer on Copyright*, which was begun by his father over fifty years ago, Professor Nimmer has the monumental task of trying to make U.S. copyright law and jurisprudence coherent by creating a framework that makes it all (or most of it) make sense. Judging from his lecture, it is a task he embraces with grace, humor and aplomb.

The title of Nimmer's lecture was "Infringement 2.0," and his overall framework involved the changing role of copyright and infringement in the current environment, where copyright protects every scrap of original expression, whether the creator needs or wants that protection, and where copying and widespread distribution can be accomplished with the click of a mouse. I want to try to outline several points from the lecture that seemed especially interesting to me (fully recognizing that I alone am responsible for any misrepresentations of Prof. Nimmer's meaning).

Nimmer began with a more qualified definition of infringement that we tend to think about normally, in my opinion — ***the unauthorized wholesale copying of works of high authorship***. Not just unauthorized copying, but wholesale copying of works of high authorship. This definition seems to suggest that courts should not spend time worrying about copyrights in family photos and other ephemera; Nimmer even raised the question of whether we should protect pornography, although he immediately recognized the First Amendment issues that such a stance would raise.

With this qualified definition of infringement as a starting place, Nimmer took us on a tour of some recent copyright rulings. What I found really interesting was his suggestion that courts are using fair use, in the digital environment to approximate the qualified definition of infringement that he suggested. Two examples will have to suffice. In the [case involving the anti-plagiarism software](#) Turnitin (A.V. v. iParadigms), the Fourth Circuit rejected an infringement claim based on the copying of entire student papers that are submitted to the service and stored to be used for comparison against later submissions. The Court reached this result by finding that Turnitin's use was a fair use, and Nimmer suggested that this use did not meet his qualified definition of an infringement because it did not copy works of "high authorship." More significantly, perhaps, Nimmer also approved of the [District Court decision in last year's](#) Google Books case that Google's scanning of millions of titles was a fair use. In his framework, Google's scanning did not amount to "wholesale" copying; even though entire works are scanned in to the database, users see only "snippets," and those very short excerpts serve important social purposes.

Whatever one may think of the individual cases, this was a fascinating approach. The copyright law says that what is fair use is not, therefore, infringement, so it makes perfect sense, for one sufficiently learned and bold, to try to understand fair use jurisprudence by looking at the limits on infringement that are thus defined by implication.

Another topic Nimmer addressed at length was the doctrine of first sale, and he was highly critical of the [Ninth Circuit decision in Vernor v. Autodesk](#), which found that Mr. Vernor committed copyright infringement when he resold legal copies of CAD DVDs in apparent violation of licensing terms. The

Ninth Circuit spent a lot of time examining those license terms, but Nimmer suggested that they were asking the wrong question. The proper question here, he suggested, was not “was this a sale or a licensing transaction,” as the Court assumed, but rather “who was the legitimate owner of the material substrate that made up this copy?” He pointed out that in both the [foundational Supreme Court case about first sale, from 1908](#), and in [last year’s decision in the \*Kirtsaeng\* case](#), the Court was dealing with legal copies where an attempt had been made, through a license, to restrict downstream resale of those copies. In both cases the Supreme Court ignored those attempts at licensing and allowed the legitimate owner of the material copies to resell the works on whatever terms he could negotiate. Based on those precedents, Nimmer suggested that the Ninth Circuit erred when it found that Vernor had infringed copyright with his resale, based on provisions in the purported license.

Another place where Nimmer suggested a radical way to rethink the copyright environment was on the international front. He asserted that the foundational principles of international copyright agreements — the prohibition of formalities and so-called “national treatment” — simply do not make sense in the Internet age, where potential copyright infringements nearly always cross national borders, and copyright owners are often impossible to locate. He suggested that this out-dated approach be replaced by something the U.N. and the W.I.P.O could do very well — a searchable, worldwide registry for copyright owners that Nimmer called a “panopticon.” His idea is that if a copyright owner has registered his or her work in the panopticon, they would be entitled to significant remedies for any act of infringement that is found. If they do not register, however, a action for infringement could only result in an award based on actual losses, not the much more substantial “statutory damages” that are often available.

This idea is nothing if not ambitious, but its foundations are commonsensical. If copyright protection is going to be completely automatic, and no notice on individual works is required, it is unfair to insist that users must have authorization for their uses if the rights holders have done nothing at all to make their claims known or to facilitate asking for permission. Lots of other property rights regimes have notice or registration rules (think of buying a house or a car) and those rules are in place to protect the owner. Why not a similar regime for international copyright, with an incentive, in terms of potential recovery available, for participation?

Finally, I want to end with Nimmer’s prediction about the prospect of a new copyright act in the United States. It seemed that he does believe that Congress will seriously undertake such a thoroughgoing revision of the law, and he suggested a betting pool on when the new copyright act would pass. For himself, he wanted to reserve a date in May of 2029. So we have that to look forward to.

# Of songs and chairs, or why do we need a public domain

*Tue, 22 Apr 2014 13:49:44, ksmithl2@duke.edu, [category: notes, category: public-domain]*

I recently received an email from an author asking me if I would write a post about why we need a public domain. Specifically, the questioner asked me why some things pass into the public domain while others do not; his example was that if you write a song, it eventually becomes PD, but if you make a chair you can keep it forever and “continue to draw enjoyment from it.”

It is understandable that the public domain is a source of annoyance and bewilderment to many creators. Their creations often seem like their children, and the expiration of copyright like an act of snatching those children away. My correspondent suggested that more people do not challenge the public domain “because everyone likes free.” But as I hope to suggest in this public answer to the question, the public domain is not free at all; it is purchased at the price of the copyright monopoly. The two things are different sides of the same coin. Were it not for the state-granted exclusive rights in copyright, there would be no need for the public domain. And we can imagine such a social arrangement; I just do not believe that most creators would think of it as an improvement.

We can begin with a deceptively simple question: Why is a chair different from a song? There are two reasons that matter here, I think. The first is that the song is intangible, which means that it is, in economic terms, [“non-rivalrous.”](#) and [non-exclusive](#). That is a fancy way of saying that multiple people can possess an intangible good at the same time. George Bernard Shaw is credited with having expressed this truth succinctly:

If you have an apple and I have an apple and we exchange these apples then you and I will still each have one apple. But if you have an idea and I have an idea and we exchanges these ideas, then each of us will have two ideas.

Obviously I can sing a favorite song without depriving anyone else of that pleasure, just as books can be printed in multiple copies so that many people can enjoy the same work without disturbing each others’ enjoyment. Only one person can sit in a chair at the same time, however (usually, at least).

The other difference is that a chair, as a piece of tangible property, is bought and sold on a basically unregulated market. The chair maker sells her creation to whomever she can find, and once she does so, she surrenders control of it entirely. If another carpenter wants to copy it, he can do so and try to sell his copies. If he charges less, the competition will benefit chair buyers but not chair makers, since it will probably drive prices down. That is simply the chance one takes in a free market.

The market for intangible goods is not a free market, however. It is controlled by a state-granted monopoly called copyright. That is, the state gives a copyright holder rights that makers of other types of goods do not get. The most obvious one is protection against copying. The chair maker takes her chances in an open market, but the song writer benefits from a protected market that virtually eliminates competition for the goods he wants to sell. No one is allowed to make copies of his song and sell it for less, or to perform it in public without his permission, and those prohibitions are enforced by our courts. The reason for this is the fear that if intangible property were subject to a free market, it would be too easy to make copies of songs or books or movies and sell them for less, just as carpenters are allowed to do. This would be good for consumers, of course, because it would lower prices, but it is

felt that it would so reduce the incentive for creators to create that we would suffer a shortage of poems and songs and films. Thus we give extra rights — rights that come with a social cost — to people who create intangible goods, and we call those rights “copyright.”

There is a clear relationship between these extra rights we give to copyright holders, that other creators and sellers of goods do not have, and the need for a public domain. Imagine for a minute that we gave similar protection against copying to chair makers. Eventually the ability to make a new chair would evaporate, since all of the possible designs that could serve the chair function would have been done by others, and all new chairs would be infringing. How could we solve this problem? By declaring that after a certain period of time — a period long enough for the chair maker to profit from his creation — older chairs would become free for others to imitate. This “public domain” for chairs would be required to keep up the supply of places to sit, if we decided to grant a state-enforced monopoly in chair design similar to copyright.

So the public domain is a required part of a system that allows creators to have monopoly control. It reduces the social cost of the monopoly by allowing less expensive editions of books or songs after that period during which an author or songwriter has the opportunity to make a profit. Remember that a chair maker can profit only once, when she sells the chair she has made. She must keep making chairs if she is to sustain a living. An author, on the other hand is allowed to profit exclusively during his entire lifetime for writing just one book, and even to pass that exclusive right to make a profit on to his children and, probably, grandchildren (based on a copyright term of life of the author plus seventy years). This obviously has a social cost; would J.D. Salinger have written more great novels if he had not been able to make a fortune over the 60 years of his life after *Catcher in the Rye* from sales of just that one book?

The most onerous cost of the copyright monopoly would be this potential reduction in new creativity. The creation of new works depends in so many cases on building upon things that have gone before. Shakespeare copied freely from earlier sources, just as George Harrison copied, albeit unconsciously, when he wrote “My Sweet Lord.” New intellectual property is always created “standing on the shoulders of giants,” and the public domain is a way to ensure that the copyright monopoly does not become a check on new creation rather than the incentive it is supposed to be. This is why the Constitution, in the clause that authorizes Congress to grant a copyright monopoly, stipulates that that monopoly be “for a limited time.” The public domain is a required part of the social and legal system of copyright protection.

As I said at the beginning, it is possible to imagine an alternative social system. Suppose we decided that we wanted neither exclusive rights (the copyright monopoly) nor the public domain. Instead, as a society we decided that authors and songwriters should be on the same footing as carpenters and everyone else who created tangible goods; all should compete on an equal footing in a free market. In the short term, this might be good for consumers. Songwriters would have to sell their songs once for the most money they could get, since their ability to make continuing profits over time would diminish. Companies and consumers would then be free to either share the song freely or undercut the sale price of competitors, so it would be easier and cheaper to obtain music, and the threat of litigation over sharing would vanish. In the long term, it is hard to say whether this would be beneficial or harmful. The conventional wisdom is that creators would stop creating because they could not make a living. But maybe they would become more like carpenters, depending for continuing income on continuous creation. If that happened, society would benefit from more creation instead of less. As for the public domain, without the exclusive rights in copyright, society would not suffer the same costs and therefore would not need the same bargain that results in the public domain. And creators would be in the same

situation, again, as chair makers; they could enjoy their creation in perpetuity, as long as they decided not to sell it. But, like the chair, once the song was sold it would be beyond the creators control forever.

I doubt that this scenario appeals to many creators. But I hope it helps illustrate why copyright and the public domain are inseparable concepts; they go together, as the old song says, like love and marriage.

# Publishing ironies

*Wed, 30 Apr 2014 17:57:25, ksmithl2@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing, category: uncategorized]*

Would Karl Marx have waived his copyright on principle? I don't know for sure, but I rather doubt it. Marx was not entirely in sympathy with Proudhon's famous assertion that "property is theft," and in any case probably expected to make at least part of his living off from his intellectual property. Nevertheless, there is something rather odd about a left-wing press asserting its own copyright to prevent the digital distribution of the Collected Works of Marx and Engels. Marx's interests are not being protected, of course; his works have been in the public domain for many years. But Lawrence & Wishart Publishing wants to protect its own income from this property by asserting a copyright in new material that is contained in the volumes, including notes, introductions and original translations, and it [has demanded](#) that the [Marxists Internet Archive](#) remove digital copies of the works.

It is interesting to consider who is being hurt by the distribution and by the take down demand. The distribution, as I say, does no harm to Marx or his descendants, since the copyright has already expired. The party harmed, of course, is the publisher, which can continue to collect revenue from public domain works, and is entitled to enforce exclusivity if, as in this case, there is new material that is currently protected by copyright.

So we have the irony of Marxist literature being protected by that most capitalist of business structures, a monopoly, and a left-wing press asserting that monopoly to limit dissemination of Marxist ideas.

Does the take down demand harm anyone? Much of this literature is available in other forms on the Internet, owing to its public domain status. Potential readers will presumably be harmed, to a degree, because English versions of some more obscure works by Marx and Engels will become unavailable if the translations in the Collected Works were the first of their kind. But I can't help thinking that the folks who are really harmed by this decision are the contemporary scholars who contributed to the volumes published by Lawrence and Wishart. Perhaps they thought that by contributing to a collected works project they had the opportunity to offer a definitive interpretation of some particular essay or letter. Perhaps they hoped to make an impact on their chosen field of study. But those opportunities are greatly reduced now. Potential readers will find the works they are looking for in other editions that remain available in the Archive, or they will not find them at all. They will look to other scholars to help them understand those works, scholars whose writings are more accessible.

While I cannot dispute the right of Lawrence and Wishart to demand exclusivity, it is a clear reminder about how poorly the traditional system of publishing, based on state-enforced exclusivity, serves scholars in an age when there are so many opportunities in the digital environment to reach a much larger audience. I suspect that the price of the Collected Works set is high, and the publisher is quite obscure (a colleague here just shrugged when I mentioned the name), so its distribution will be quite limited. It is a sad illustration of how traditional publishing that relies on subscriptions for digital material is inextricably mired in the print model, trying desperately to reproduce the scarcity of print resources in defiance of the abundance possible in the digital environment. The losers in that effort are the scholars whose ability to impact their field is deliberately reduced by this effort — beyond their control — to preserve exclusivity and scarcity.



“Beyond their control” leads directly to the other irony from the publishing industry that I want to share in this post. A colleague recently sent me a PDF of the preliminary program for the conference being held in Boston next month of the Society for Scholarly Publishing. It was the description of the very first seminar that caught both her eye and mine:

*Seminar 1: Open Access Mandates and Open Access “Mandates:” How Much Control Should Scholars Have over Their Work?* Many universities now mandate that faculty authors deposit their work in Open Access university repositories. Others are developing this expectation, but not yet mandating participation. This seminar will review various mandatory and non-mandatory OA deposit policies, the implementation of different policies, and the responses of faculty members to them. Panelists will discuss the degree to which academic institutions ought to determine the disposition of publications originating on their campus.

It is hard to believe that the SSP could print this session description with a straight face. Surely they know that the law deliberately gives scholars a great deal of control over their work, in the form of copyright. Scholars exercise that control in a variety of ways, including when they vote to adopt an open access policy, as many have done. So where is the threat to scholar’s control over their own works? Perhaps at the point where they are required to relinquish their copyright as a condition of publication. If the SSP were really concerned about scholars having control over their own writings, the panel for this session would be discussing how to modify copyright transfer policies so that scholarly publishers would stop demanding that faculty authors give up all of their rights.

The SSP has carefully written the session description to make it sound like open access policies are imposed on faculty against their will. But every policy I am aware of was adopted by the faculty themselves, usually after extensive discussions. And the majority of policies have liberal waiver provisions, so that faculty who do not wish to grant a license for open access do not have to do so. On the other hand, publishers almost never provide a similar way for authors to opt out of mandatory copyright transfer, other than paying a significant fee for an author-pays OA option, which offers authors a chance to buy what they already own. Perhaps this concern about authorial control could be channeled into a discussion about the new models of scholarly publishing that are developing that do not require copyright transfer and that seek alternate ways to finance the improved access so many university faculties are indicating they want.

There is a lot to talk about here, especially in terms of authorial control. Consulting the authors whose material is published in the Collected Works of Marx and Engels might have engendered discussion of a solution to the issue about the Marxists Archive other than simply demanding removal. Maybe those authors should have resisted the demand to transfer copyright wholesale to Lawrence and Wishart in the first place. But publishers continue to think in terms of total control over the works they publish; that is the real threat to authors and that is the problem that the SSP ought to be addressing.

# On Copyright and negligence

Thu, 08 May 2014 13:33:17, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

Last week I received the April 2014 issue of *Against the Grain*, which, to be honest, is not a publication I read at all regularly. But I do sometimes skim it for copyright articles, and today my eye was caught by an op-ed piece from Mark Herring of Winthrop University about the Google Books decision.

Although its title asks a simple and moderate question — “Is the Google Books Decision an Unqualified Good?” — the article itself is quite extreme in its point of view and for the most part does not engage with the actual decision. Instead it is a hyperbolic diatribe about why we should all be afraid of Google; it ends with the assertion that “In a sense, we all work for Google now, free of charge.” I have no clue what that means, but it is pretty clearly an exaggeration. Nevertheless, there are a couple of points made in this op-ed that are prevalent enough to be worth discussing.

By the way, normally I would provide a link to any article I discuss here, particularly when I do so in a critical way. I want readers to have a way to evaluate the whole debate, not just my side of it. But in this instance, the op-ed does not appear to be on the [ATG website](#). So anyone who wants to see both sides, as it were, is encouraged to track down a copy of the April issue of ATG.

I want to start with Dean Herring’s second reservation about what he calls the “Google Book Theft.” He complains that there is “no evidence, no empirical evidence, that shows any additional exposure of any authors’ works improves royalties” and calls Google Books “cruel” for “taking away from academics any chance to improve [their] anemic bottom lines.” Of course, it is easy to see the shift in this paragraph when I put the two sentences together — from no “evidence of improvement” Herring moves immediately to “taking away any chance” of improvement, a leap not justified by logic. But I am more interested in looking at the decision for what it actually is, a legal opinion at the end of the first stage of a court case. In that context, should we have expected either Google or the judge to have presented evidence of an improvement in royalties?

The point I want to emphasize is that copyright infringement is a “tort” — a civil (non-criminal) wrong for which courts can provide a remedy. In structure, a copyright infringement case is not very different from other kinds of tort litigation. For one thing, there must be a finding of harm. In copyright infringement cases the harm is often presumed — if a plaintiff shows that their copyright has been infringed, the court will usually presume, subject to rebuttal, that there has been harm. But a judge is entitled to look at a particular set of circumstances, as Judge Chin did, and decide that he can find no harm. Some harm is a necessary element of most torts and is explicit as well in the fair use argument (under the market harm factor). So it is asking the wrong question to require evidence of an improvement in royalties; all the court needed to conclude in order to stay within the framework of legal analysis was that the likelihood was more on the side of such improvement than harm.

To put this another way, the burden of showing harm falls on the plaintiff.

This general framework of tort litigation is also important when we look at another argument Dean Herring makes, that after this case fair use could apply to anything. He writes, “Determining what fair use is now is anyone’s guess. Everything is, the way I read it.” It is a fairly common strategy of those who favor stronger and stronger copyright protection to take the line that copyright, and fair use especially, is too difficult and must be avoided because of its uncertainty. This hand-wringing about how

the court has now abandoned all structure or logic in making a fair use finding is really just another version of that argument, in my opinion. But fair use remains today what it was before Judge Chin's ruling, an "equitable rule of reason" that requires courts to examine the specific circumstances of a challenged use and determine, based on those particular facts, if the use was fair. It is not a bright-line rule, but that does not mean it is random, unpredictable or unusable.

Here is where I want to return to tort litigation, and suggest an analogy I heard a few weeks ago from Peter Jaszi, who teaches copyright law at American University. He reminded his audience that we have lots of laws that depend on courts determining what is reasonable. It is very common in contract law, for instance. But Professor Jaszi focused on a different area of tort law for his analogy for fair use — the law of negligence. For a driver, for instance, to avoid being guilty of negligence she must exercise "due care," which is defined as the standard of care that a "reasonably prudent" person would exercise in the same situation. Arguably, this standard for non-negligent driving is even more nebulous than fair use (where we are given factors to assess the facts). Yet all of us continue to drive, and I dare say most of us think we know what is an appropriate level of care when we do so. Most of us, anyway, are not paralyzed with fear because the basic rule about legal driving is so uncertain and subjective. Nor should we be about fair use. And, of course, neither "fair use" nor "due care" results in a free-for-all, they just give the courts the discretion to look at specific facts and try to render justice.

The best thing that Professor Jaszi said during his discussion of this parallel, and the thing I have come all this rhetorical distance to repeat, involves how we learn what it means to exercise due care as drivers. The simple answer is that we talk to other people, and we watch how other people drive. Over time we develop a flexible but fairly accurate sense of what we should and should not do in a particular situation, even if we have not seen the particular circumstances before. We do not require rigid rules that anticipate every eventuality in order to dare to get in the car each day; we have internalized that nebulous standard of due care and we carry it with us on each trip. Sometimes we make mistakes, but most of the time we do just fine. And here is a model for how we should think about fair use. We learn what it is by talking with others about situations we encounter frequently. We think through the factors in new circumstances as they arise. We read how courts have applied those factors in defining ways. And we become good fair users — fair fair users, if you will — just as we become good drivers.

Fair use is neither an empty notion nor a license to do anything, and one case, not even the Google Books case, cannot make it so. It remains a flexible tool that is a necessary part of the copyright structure, and one which careful and sensible people can learn to use with care and discernment.

# Superrights for textbooks?

*Sat, 10 May 2014 21:01:42, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: licensing, category: scholarly-publishing]*

This past week there have been a lot of angry blog posts about the new “Connected Casebook” plan from Aspen Publishers (Wolters Kluwer Legal Education) that would attempt to deprive students of their rights under the First Sale doctrine in U.S. law to resell the books that they buy. Aspen publishes case books — the textbooks made up largely of court decisions that are fundamental to the teaching in U.S. law schools. With this new program they are “offering” students allegedly perpetual access to an online version of the book with digital tools, but attempting to require that the print version of the book be returned after the class is over, even if it is marked up and annotated. The idea, of course, is to undercut the secondary market for print textbooks so that each student will have to pay \$200+ for a new book package.

Many folks have already critically examined the plan, so I will just offer some links to those earlier posts — from law professors [Josh Blackman](#) and [James Grimmelmann](#), from the [Electronic Freedom Foundation](#) and from the [Washington Post](#). It is worth noting that Professor Grimmelmann [began a petition](#) that includes a pledge from law professors not to assign Aspen casebooks.

[Since these blog posts were posted](#), Wolters Kluwer has responded with a [letter in which they clarify their intentions](#), stating that the Connected Casebook program will be an option for students, but that they will still be able to elect to buy a traditional print textbook in which they will have the right of first sale, meaning that they can resell the book once the class is over.

In spite of this plethora of words about the issue, I have several comments I want to make.

First, just a reminder that these attempts to undermine the right of first sale are an effort from publishers to gain a sort of “super” property right. No other property owner expects to be able to sell their product and still be able to prevent the purchaser from making a resale. To see the absurdity of this, imagine if Ford tried to shut down the market for used cars by including such a restriction in a purchase contract; it would be a quick way to go out of business. If Aspen really cannot survive in a market where resale is an option — this has been the case in the U.S. for its entire history, as well as in the rest of the world for a long time — it is probably time for them to shut off the lights and go home.

At least I suppose we should be grateful that Aspen says this will be only an option, not the sole way in which textbooks can be obtained. They are saying that the digital bells and whistles that they will offer with the Connected Casebook program are carrots intended to lure students into surrendering their first sale rights, not sticks that will coerce them. In that light, it is interesting to consider if it will work. Studies suggest that the included digital links and things associated with many textbooks do not get used very much. I wonder if the price will be the same for the traditional textbook, with a resale option included, and the “Connected” casebook, which has outlining tools and allegedly lifetime access to the digital edition, but requires the renunciation of first sale rights? As Professor Grimmelmann points out, “we know from sad experience that gerbils have better life expectancy than DRM platforms,” so lifetime access is really not very likely. In any case, case books become outdated really quickly, and the large secondary market (that Aspen wants to curtail) indicates that students are not very interested in lifetime access.

Perhaps this new program should be a teaching moment for law professors. Licensing and contract law are relevant to nearly every legal subject, after all, so any class in which an Aspen Casebook is assigned might begin with an opportunity for students to reflect on the decision they are asked to make and to explain their ultimate choice. The interplay of price, features, expectations and rights would make for interesting reflections, and students could begin to try to decide if the restriction requiring return of the book is actually enforceable.

Enforceability does seem like an issue here. The basic idea is to have students buy a package — print book and digital access — then use the license for the latter to curtail rights in the former. But our courts have looked very unfavorably on licenses that attempt to curtail first sale, in cases as old as *Bobbs-Merrill v. Straus* (1908) and as recent as *Kirtsaeng v. Wiley* (2012). It is true that the Ninth Circuit recently did enforce a license restriction on first sale imposed on software CD-ROMs, but in that case (which seems dubious given the two Supreme Court precedents mentioned above) at least the license was for the same, singular product. I am pretty confident that courts would be more skeptical of the Aspen license, which attempts to negate a long standing public right in a format that is not traditionally governed by licensing terms at all through the licensing of a different format. A court challenge to this would be very interesting and would raise the issue, as the EFF notes, of what the boundaries of a sale really are. Certainly if the scheme were ever imposed as the only option for obtaining these textbooks, it would cry out for an action on the part of law students seeking declaratory judgment on the issue of enforceability.

The biggest takeaway from this controversy should be a reminder of the opportunity to create open educational resources that can avoid all of these silly and desperate efforts from publishers to maintain control even after the sale of a book. No field is more amenable to open textbooks than law, after all, where the large majority of the content, the cases themselves, are in the public domain. The licensing problems for online casebooks are greatly reduced, and there are consequently already some excellent examples of open online law texts, including [Grimmelmann on Internet law](#) and Herbert Hovenkamp (himself the author of an Aspen casebook) on [Innovation and Competition Policy](#). I would love to see many of the over 300 law professors who have signed Grimmelmann's petition commit to creating open online case books in their own fields of expertise. If that happened, the problem would go away very quickly, and the cost of a legal education would be significantly reduced.

We need to remember that this model for textbook “sales” is likely to spread. The various strategies that publishers have used to try to undermine the secondary market for textbooks are various and ongoing, as the recent *Kirtsaeng v. Wiley* case illustrates. Although it is never put this way, this is part of an overall sense from academic publishers that they are entitled to a larger share of the money that students spend on education. These strategies would always have the effect of making education more expensive, so we need to remain vigilant for the next such effort and resist it on behalf of the students we serve.

# Copyright roundup 1—the Supreme Court

Mon, 26 May 2014 07:35:00, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]

Last week the U.S. Supreme Court ruled in a copyright case, and I want to make readers aware of it, but also point out that it is likely to have little impact on libraries. In *Petrella v. MGM Studios*, the majority of the Court, in an [opinion written by Justice Ginsburg](#), held that the equitable doctrine called “laches” cannot be used to stop a rights holder from bringing a lawsuit even where she has delayed her filing for twenty years. Laches is a judge-made doctrine that prevents people from “sitting on their rights” unreasonably, especially where the delay is prejudicial to the defendant. In this case, however, the Court held that the scheme built into the copyright law — a very long term of protection but a three-year limitation on recovery for infringement — adequately accounts for the risk of delay.

The facts of the case are odd. Ms. Petrella owns all of the rights in the screenplay for the movie *Raging Bull*, and has done since she inherited from her father in 1981. She renewed the copyright in 1991, and first informed MGM of her rights seven years later, in 1998. She did not file suit for infringement until 2009. MGM argued that she waited too long, that she had delayed in order to bring suit when it would be most lucrative to her and financially difficult for the studio, and that important evidence had become unavailable due to the delay. For all these reasons the lower courts dismissed her lawsuit, relying on the equitable doctrine of laches. But the Supreme Court reversed, saying that the structure of the copyright law itself anticipated and accounted for delay. Petrella is entitled to recover for infringements that occurred in the three years prior to her lawsuit, if she can prove infringement, and the district court must give her that chance.

The Court’s opinion is very pedagogical in its approach, providing a clear account of the four major doctrines in play in its first section. That portion, at least, is worth reading because it explains some obscure doctrines quite well. I am interested here in one specific part of the copyright law related to the case, the idea of a rolling statute of limitations. As Justice Ginsburg notes, the term of protection is very long, and if a rights holder could sue anytime for acts that occurred many years earlier, the result would be a tremendous amount of litigation and some manifest injustice. So the law provides this three year window. A rights holder can, apparently, bring a lawsuit whenever she wishes, but can recover damages only for infringing acts that occurred within the three years immediately prior to the litigation.

Imagine, as an example, that I wrote a book that infringed the copyright of a famous author. My book sold poorly, but, freakishly, one copy per month was sold every month for five years. At the end of that time, famous author sues me. That suit can recover damages only for the 36 infringements that occurred in the previous three years (one infringing copy sold per month in those three years). The 24 copies sold in the two earlier years are outside the window created by this rolling statute of limitations, so famous author cannot reach back to include those infringing acts in his lawsuit. By contrast, if my infringement had been a single unauthorized public performance of famous author’s work, about which he knew when it took place, but he waits four years to sue me, he will be entirely out of luck. That single act of infringement (as opposed to the ongoing sales in my first example) took place too long before the lawsuit and is outside the window of the statute of limitations.

One thing this case reminds us is that [copyright issues make for strange alliances](#). As usual, the split in the Court is not along usual liberal v. conservative lines. Scalia, Thomas and Alito join Ginsburg, Kagan and Sotomayor in the majority opinion, while Roberts and Kennedy join Breyer in his dissent. One thing that is consistent is that Breyer and Ginsburg have very different views about copyright, and they are usually the opinion authors on the two sides of any copyright issue that comes before the Court.

Another oddity is for a major motion picture studio to be arguing in favor of a limit on rights holders' ability to recover for infringement. The application of laches, had their argument been upheld, would almost certainly have come back to bite them. Their defense of laches as a limitation on the right to sue even for infringing acts that occurred with the three year statute of limitations in this peculiar case seems to have been a matter of pure opportunism.

In her opinion, Justice Ginsburg makes one remark that is rather striking and represents a new approach for the Court. She is defending the option of a rights holder to delay her lawsuit for a variety of reasons, including, as in the *Petrella* case, to see if the recovery would be worth the cost of suing. But this is what J. Ginsburg says:

There is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even compliments it. Fan sites prompted by a book or film, for example, may benefit the copyright owner.

I don't know that the Court has every before acknowledge that infringements might be beneficial to rights holders. Perhaps this is an acknowledgement of the myriad potential for reuse and remix. Certainly the authors of fan fiction should feel buoyed by the remark. From a more technical perspective, it seems to me to further undermine what was once a strongly held belief that whenever infringement was found, harm could be presumed. It seems clear that the Court is now reinserting harm as a separate element in the plaintiff burden of proving the tort of copyright infringement.

Although I am usually more often on Justice Breyer's side on copyright issue than Justice Ginsburg's, in my opinion the majority opinion seems right given the particular circumstances of the case, and the way the statute is constructed. In his dissent J. Breyer asserts that the majority is now "erasing laches from the copyright lexicon," but it is not clear to me that that is the case. J. Ginsburg acknowledges some extraordinary cases where laches would still apply to bar a lawsuit over copyright infringement, but she does not find such circumstances in this case. And although J. Breyer is persuasive in the suggestion that laches does still have a place, it is not clear that the *Petrella* situation presents such circumstances, and he really does not argue that it should.

For routine library practices this case will have relatively little impact. Libraries try hard to avoid infringement, of course, and, when challenged, they have strong defenses built into the statute, so they need rely less on equitable defenses like laches. As I said above, the main value of this opinion may be an opportunity to be reminded of the doctrines surrounding when a lawsuit can be brought and when it would be untimely. But it also raises the possibility, albeit obliquely, that a defendant could argue that there has been no harm from the infringement and even that the added distribution of the work has supported its commercial value. Since Judge Chin made this argument in his dismissal of the Google Books lawsuit brought by the hapless Authors Guild, even oblique support from the Supreme Court is significant.

# Why I joined the Authors Alliance

Wed, 21 May 2014 08:39:17, ksmithl2@duke.edu, [category: authors-rights, category: scholarly-publishing]

A new organization for authors, called [the Authors Alliance](#), is launching today (May 21) with a reception in San Francisco at the headquarters of the Internet Archive. I cannot attend, but a couple of weeks ago I responded to an invitation and became a founding member of the Alliance; I also made a small financial contribution to help the group get off the ground. This seemed like an obvious move to me. Why shouldn't academic authors, as well as the multitude of others who write for reasons not directly linked to commercial sales, have an organization that represents their interests? Surely the idea of (mostly) academic authors organizing to further their own interests is not controversial.

But after I joined the Authors Alliance, a colleague sent me a link to an [amazing, apparently distraught blog post](#) on the website of the Authors Guild that seems to be warning AG members about the dangers posed by the Authors Alliance. Although the author of the post, a successful author of biographies named T.J. Stiles, affects a tone of calm, his misinformation and efforts to sound contemptuous make it very clear that the Alliance is perceived as a threat by the AG. Which, of course, is an additional argument for signing up.

Throughout his post, Stiles talks about the Alliance as an organization for people who want to “give away” their work. He sarcastically suggests that,

If you think, in our digital age, that the biggest problem facing authors is how hard it is to give your work away for free, it's for you. If you think you've got too much power over people who copy and distribute your work without your permission, by all means sign up.

This, of course, is a profound misunderstanding of the situation of academic authors. Under the current system, academic authors are almost always *required* to give away their work for free to publishers, who then sell it at a profit. Stiles, who worked for years for Oxford University Press, ought to know this. The “power over people who copy and distribute your work” is all held by these publishers, who become the copyright holders once academic authors sign transfer agreements as a condition of publication. One reason for joining the Authors Alliance is precisely so that academic authors can retain more control and give away less.

In his desperation to say bad things about this new organization, which has yet to take any positions or actions as a group, Stiles is even willing to contradict himself. He refers to the Alliance as “an astroturf organization. It was not organized by authors, nor is it governed by them. The four directors are Berkeley academics.” But in other places he acknowledges the obvious fact that academics are authors; they are just supported by a different financial model than that to which the Authors Guild myopically clings. Make no mistake; the Authors Alliance is organized and governed by authors in order to represent the interests of authors.

Stiles goes on to assert some of the putative stances the Alliance might take, although he acknowledges that it is too early to know for sure. Instead, he just extrapolates based on gross exaggerations of some of the academic arguments made by Alliance board members, especially Professor Pam Samuelson. For example, based on arguments for a digital first sale right, he makes the absurd claim that the Alliance would want a world where “anyone could become a publisher of your book,” based on the idea that



resale would always involve copying. Stiles carefully ignores the fact that all such discussions, to my knowledge at least, advocate for a “forward and delete” regime that would replicate the physical first sale right that has been part of U.S. copyright law for over a century. Likewise Stiles claims that members of the Alliance board have advocated for “allowing potentially unlimited copying for educational uses.” If so, I have never heard them. What I have heard, and advocate for, is a fair use right — again part of our law for more than 170 years — that works for education in those cases where it does not threaten the commercial sales of the works. That, in fact, is exactly what Judge Chin evoked when he ruled against the AG in their lawsuits against the Google Books project.

Stiles’ essay is an exercise in fear-mongering and, when he begins to cite the salaries paid to some of its academic founders, a rather petulant envy. Since he has spent a lot of space offering fictionalized reasons that one might join the Authors Alliance, let me close by citing two that were specifically important to me when I decided to join.

First, it has the potential to be far more representative of authors as a whole than the Authors Guild is. It is the AG that is really a niche organization, representing, according to public documents, about 8,000 members. There are, of course, vastly more authors than that in the U.S; indeed, there is a larger number of potential academic authors than that total just within a 30-mile radius of where I sit as I write this, because of the four large universities in the Research Triangle. The Authors Guild sees itself as representing a single type of author — those who wish to sell their books through commercial outlets and who have had success doing so. This is a very small percentage of authors. The remaining group are not bad authors, or all amateurs, as Stiles implies; they are just authors who making their living based on different business models.

Which brings me to my second reason for joining the Authors Alliance; it can represent a much more diverse perspective on the business and technology of authorship. The truth is that the Authors Guild is apparently irredeemably wedded to a single business model, which is itself tied to the technology of print. That business model depends, even in its digital forms, on making the book (or article) a scarce object and then limiting its readership to those who pay to obtain a (costly) copy. This model only developed with the printing press, and as other options “come online” its relevance is fading. Limiting readership, while necessary to the print-based approach to authorship, is not something that actually appeals to many authors. Most people, I would think, write so that lots of people will read their work. If other ways can be found to reimburse their effort while still supporting a wide readership, that is all to the good.

Of course, for most of our history writers have been supported in other ways. Shakespeare and Dante were supported by patrons. Many authors today are supported by a similar kind of patronage, from foundations, agencies or, indeed, universities. Stiles himself, as the winner of the 2010 Pulitzer Prize for Biography, which carries a cash award with it, is not unfamiliar with a certain kind of patronage support. So when he says that one should not join the Authors Alliance if “you earn a living as a writer, or hope to” he is being incredibly myopic. And when he goes on to cite the salaries of some of the academic authors who are founding the Alliance he exposes his hypocrisy and envy. These academic founders of the Alliance DO make their livings as writers, and their substantial salaries are testimony to their skill at it. Authorship is a requirement of the jobs that pay them those salaries, and they are repeatedly evaluated on the basis of their writings, as well as other factors, in order to be sure they are providing value for money.

The point is that there are many ways in which writers are supported in their endeavors, and even more various are the reasons that people become writers. The Authors Guild is focused on a single reason

and a single business model, and it is sinking into irrelevance because of that limited vision. Stiles' essay reflects the desperation of the AG as much as its quixotic campaign of lawsuits does. So why join the Authors Alliance? Because academic authors need a representative body that can look beyond a single model to embrace new technologies and business models that are both new and, sometimes, old. Because we need a representative group that has the vision and flexibility to be relevant and influential well into the 21st century.

# Copyright roundup 2 — Orphan Works

*Wed, 28 May 2014 08:50:04, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: orphan-works]*

Recently the Copyright Office has held a series of [roundtable discussions and comment periods](#) on the subject of orphan works. As seasoned readers will know, this has become a kind of movable feast, happening at regular but unpredictable intervals. My suspicion is that the CO is under a lot of pressure from big rights holder groups to find some way to impose a collective licensing scheme for orphan works, and these periodic discussions and reports are an effort to stave off the importuning of the lobbyists. Certainly Congress has shown very little interest in adopting an orphan works “solution,” and as more and more courts recognize that fair use can move us a long way towards productive uses of orphaned works without introducing the “tax for nobody” that would be imposed by an extended collective licensing scheme, that appetite is likely to decline even further.

Because the events seem to have so little payoff, I admit that I allowed the pressure of other work to cause me to largely ignore this iteration. In the past I have helped Duke and other organizations prepare comments, but this time I left the heavy lifting to colleagues. Fortunately there is a growing cadre of people able to advance the arguments in favor of fair use and the best ways to deal with the immense problem of orphan works, so my neglect was trivial. But I still want to help my readers find some of the best commentary from this latest round of discussions.

From what I have heard, at least one of these roundtables generated a lot more heat than light, featuring some shouting and at least one direct threat of litigation from a rights holders’ representative. But apart from the circus atmosphere, substantive issues were discussed, and a great summary of the more mature parts of the conversation can be found in [this post from the ARL Policy Notes blog](#).

For the library community, the strongest support we get in these events comes from the superb work of the Library Copyright Alliance, which is supported by the ALA, the ARL and the ACRL. The [full set of comments prepared by the LCA](#) and submitted on behalf of our profession is a wonderful introduction to the problem, why it matters so much to libraries, and the directions from which a solution might come.

Perhaps the most important result of this discussion, building nicely on the LCA comments, is this [great set of comments about myths and misstatements regarding fair use](#). These events sometimes seem like mere opportunities for lobbyists to tell tall tales to Congressional staffers and bureaucrats, and it is often necessary to try, after the fact, to set straight a very crooked record. On the issue of fair use, Brandon Butler, Peter Jazsi and Mike Carroll, all from American University, do a great job of correcting the erroneous things that were said in these public events. Their comments offer a clear vision of fair use as a coherent and reliable doctrine that has evolved logically over time, continuing to perform its core function even in periods of rapid technological change. This is a great statement and should be required reading for every librarian and academic.

One sentence summary of the comments; fair use is neither unpredictable nor incoherent, as some have argued, but is an evolving doctrine that is relied upon safely by millions of ordinary people and can provide a strong foundation for the careful consideration of even mass programs of digitization.

Finally, as I said above, one of the purposes of these regular events seems to be to try to stumble towards an extended collective licensing scheme that Congress might consider, even though these

schemes impose an unnecessary tax on users without benefiting legitimate rights holders and have not worked well in the nations that have tried them. These [comments about ECL schemes from the Electronic Frontiers Foundation](#) are also worth reading. They do an excellent job of briefly explaining the broad consensus that ECL is a poor solution to the orphan works problem.

# Copyright roundup 3 — Changes in UK law

*Fri, 30 May 2014 07:13:14, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: international-ip, category: technologies]*

In this final installment of the copyright roundup I have been doing this week, I want to note some remarkable developments in the copyright law of the United Kingdom, where a hugely significant revision of the statute received final approval this month and will be given royal assent, the last stage of becoming law, in June.

Readers may recall that the UK undertook a study of how to reform copyright law in ways that would encourage more innovation and economic competitiveness. The resulting report, called the Hargreaves Report, made a number of recommendations, many of which were focused on creating limitations and exceptions to the exclusive rights in copyright so that the law would work more like it does in the U.S., including the flexibility provided by fair use. The final results of this legislative process do not include an American-like fair use provision, but they do result in a significant expansion of the fair dealing provisions in U.K. law to better accomplish some of the same things fair use has allowed in the U.S.

Fair dealing is found in a couple of provisions of the British law and allows certain specified activities if those activities are done in a “fair” manner, with specified criteria for fairness. Until now the categories have been narrow and few, but Parliament has just expanded them dramatically. A [description of this expansion from the Charter Institute of Library and Information Professionals can be found on the CILIP site](#). A number of activities that are probably permitted by fair use in the U.S. are now also encompassed by fair dealing in Britain, including private copying, copying by libraries in order to provide those copies to individual users, and some significant expansion of the ability to make copies for the purpose of education.

On this last point, I wonder if the two British university presses that are suing a U.S. university over educational copying have noticed that the tide is against them even at home.

There is an explanatory memo about these changes written by the U.K. Intellectual Property Office [available here](#). It is interesting to see how certain goals that have been accomplished by the courts in the U.S. and, importantly, [in Canada](#) are now intentionally being supported in this British legislation. As I say, we are seeing a fairly strong international tide pushing towards expanded user rights in the digital environment, lest legacy industries use copyright to suppress economic development in their anxiety to prevent competition.

Several points about this legislative reform seem especially important to me.

First is the emphasis in several of the new provisions on supporting both research with and preservation of sound recordings and film. This is one of several places where the U.K. may reasonably be said to have just leapfrogged over the United States, since the provisions about non-profit use and preservation of music and film remain a mess in our law.

Second, the British are now adopting an exception for text and data mining into their law. This is huge, and reinforces the idea I have expressed before that libraries should be reluctant about agreeing to licensing terms around TDM; the rights are likely already held by users in many cases, so those provisions really would have the effect, despite being promoted as assisting research, of putting constraints (and sometimes added costs) on what scholars can already do. This is probably true in the

U.S., where fair use likely gets us further than vendor licenses would, and it has now been made explicit in the U.K.

Another major improvement in the U.K. over U.S. copyright is the fact, explained in the CILIP post, that [M]any of these core “permitted acts” in copyright law given to us by parliament all not be able to be overridden by contracts that have been signed. This is of vital importance, as without this provision, existing and new exceptions in law could subsequently simply be overridden by a contract. Also many contracts are based in the laws of other countries (often the US). This important provision means that libraries and their users no longer need to worry about what the contract allows or disallows but just apply UK copyright exceptions to the electronic publications they have purchased.

This type of approach is desperately needed in the U.S. If we truly believe that the activities that are supported by core exceptions to the rights under copyright, like education, library services and fair use, are beneficial to society and part of the basic public purpose of copyright, they should remain in place regardless of provisions inserted into private law contracts. Now that the British have made this acknowledgement, it is time for the U.S. to catch up.

Competitiveness is often an important part of the discussion over copyright law. Rights holders argue that terms should be lengthened and enforcement improved in order to enhance competition with other nations. The U.K. began its copyright reform process in order to improve its ability to compete for high-tech business. And this new revision of the British law puts the U.S. back in a situation where we must continue to strengthen not the rights of legacy industries but the rights of users — which is where innovation will come from — because other parts of the world are moving past us in this area. How to we do this, in the two key areas I have identified? In the area of the right to mine text and data for non-profit research purposes, this is something our courts can do, through interpretation of the fair use provision. We can hope that such an opinion might appear in the near future, although I am not aware of what case might prompt it. But contract preemption is something that Congress will have to address. If the U.S. Congress is serious about copyright reform, and really wants to help it to continue to be a tool of economic progress in the U.S., they should put the issue of making user rights exceptions impervious to contract provisions that attempt to limit or eliminate them at the top of the legislative agenda.

# Apology

*Mon, 09 Jun 2014 19:37:29, ksmithl2@duke.edu, [category: uncategorized]*

A significant number of subscribers got spammed by this list today. Routine maintenance of the development server at Duke triggered a mistaken torrent of hundreds of old posts. The biggest problem was that there was a partial subscriber list as part of the development instance of the blog. That list has been removed, so this particular problem should never happen again. There was no hacking involved, and subscriber e-mails did not get harvested or released to anyone.

I am very sorry this happened. I certainly understand if folks want to unsubscribe from the list, but emphasize again that the production version of the blog did not cause this and was not compromised. The list of subscribers that was inadvertently associated with the development instance is no more.

# A MOOC on copyright

*Fri, 06 Jun 2014 14:54:48, ksmithl2@duke.edu, [category: notes, category: libraries, category: technologies]*

It has taken a while to get here, but I am happy to be able to announce that two of my colleagues and I will be offering a four-week MOOC on copyright designed to assist teachers and librarians deal with the daily challenges they encounter in regard to managing what they create and using what they need.

The MOOC will be offered on the Coursera platform and will run for the first time starting July 21. It is available as of today for folks to sign up at <https://www.coursera.org/course/cfel>.

It has been a great pleasure working with Anne Gilliland from the University of North Carolina Chapel Hill and Lisa Macklin from Emory University to create this course. I hope and believe that the course is much stronger because the three of us worked together than it could possibly have been if any one of us did it alone.

This course will be four weeks in duration and focuses on U.S. copyright law. While we are well aware of all the MOOC participants from other countries — and welcome folks from all over to join us — we also wanted to keep the course short and as focused as possible. We hope perhaps to do other courses over time, and a more in-depth attention to international issues and to how copyright works on the global Internet might be a good future topic. In the meanwhile, this course deals with the U.S. law and the specific situations and issues that arise for librarians and educators at all levels.

We especially hope to attract K-12 teachers, who encounter many of the same issues that arise in higher education, and who often have even fewer resources to appeal to for assistance. That is one reason for the summertime launch.

Another point about the focus in this course — our goal is to provide participants with a practical framework for analyzing copyright issues that they encounter in their professional work. We use a lot of real life examples — some of them quite complex and amusing — to help participants get used to the systematic analysis of copyright problems.

For many in the academic library community, the winding up of the courses offered by the Center for Intellectual Property at the University of Maryland University College has left a real gap. This course is intentionally a first step toward addressing that gap. It is, of course, free, and a statement of accomplishment is available for all participants who complete the course. We hope this can assist our colleagues in education with some professional development, and maybe, depending on local requirements, even continuing education requirements.

We very much hope that this course will be a service to the library and education community, and that it provides a relatively fun and painless way to go deeper into copyright than the average presentation or short workshop allows.



# A win, oddly

Wed, 11 Jun 2014 07:33:35, ksmithl2@duke.edu, [category: uncategorized]

Because I am on vacation this week and have very intermittent Internet access, I am hardly the first to announce that the Second Circuit Court of Appeals affirmed the lower court decision (mostly) in the *Authors Guild v. HathiTrust* lawsuit. I am a bit paranoid about major decisions coming down on days when I am out of touch, but that is another matter. The important point is that [the decision is another important win for libraries and fair use](#), brought to us by the foolishly litigious Authors Guild. It is the first of three major appeals in fair use cases that academic libraries should be watching carefully, and it may help cause a domino effect in those other two (the Georgia State and Google Books cases).

This potential for impact on decisions currently being written by other judges is increased by the fact that the Second Circuit, in discussing transformation as a major element in fair use deliberately cited precedents from its own previous cases, but also cases from the Ninth Circuit and two other Circuit Courts of Appeal. The judges seem to be deliberately rejecting the idea that the circuits are split about transformative fair use.

This decision is very good news for libraries, and the [ARL Public Policy Notes](#) description of the decision is well worth reading. But for all its positives, it has to be admitted that there are some oddities in this decision.

Basically, the Court did three different things in this decision:

1. It affirmed the lower court ruling that the Authors Guild did not have standing — the right to bring the lawsuit — of behalf of its members. Another reminder of the oft-repeated rule that only a rights holder may sue to defend those rights, and associations that claim to represent rights holders but do not own any rights are not proper plaintiffs. A simple lesson the Authors Guild declines to learn.
2. The court also affirmed that mass digitization for the purpose of creating a searchable index of full-text materials, as well as to provide access to those materials for persons with disabilities, is fair use. There is a lot of language in this opinion that reinforces the ARL Code of Best Practices for Fair Use in Academic Libraries.
3. Finally, the judges remanded the case back to the lower court in regard to its opinion about fair use for preservation. This is one of the oddities in the decision, so let's address that one first.

The oddity about this remand is that it does not actually question the conclusion that digitization for preservation can be fair use. Instead, the Court sent this portion of the case back to the lower court to decide if there was any plaintiff remaining in the case, once it was determined that the AG lacked standing, who was at any real risk of having a preservation copy of their book released by HathiTrust while there were still copies commercially available. In short, The Court of Appeals suggested that any ruling about fair use might have been premature because there was no plaintiff in a legally-recognizable position to raise the challenge. It is still entirely possible that, if such a plaintiff is found in the remaining group of named authors, fair use could nevertheless be affirmed. And, because of the rest of the ruling, it would be hard to see what difference even a ruling against fair use for preservation would make to the actual practice of the HathiTrust. So this was really a technicality, and quite strange.

By the way, in regard to the key argument raised by the Authors Guild that the library-specific exception in section 108 precludes libraries from relying on fair use, the court paid almost no attention. It dismissed this silly argument in a footnote (footnote 4 on page 13). This was a losing argument from the start, and the reliance placed on it by the AG shows just how out of touch they are in their approach to copyright.

I think three points are important about the fair use decision favoring HathiTrust in this case (the factor-by-factor analysis is handled well in the ARL post).

First, the Second Circuit accepted the same broad approach to the issue of transformation as has become common in other decisions. It is not just actual changes to the original work that can support a finding of transformation, but a “different purpose... new expression, meaning or message.” And, as I said, the Court appealed to a broad consensus across the country in defining transformation this way.

Second, the Second Circuit held that the lower court was wrong to find that digitization for the purpose of facilitating access for persons with visual or print disabilities was transformative, but found that it was fair use nevertheless. This is important, because in the Georgia State appeal the plaintiffs are arguing that because Judge Evans found that copying for electronic reserves was not transformative, she was in error to still find fair use. But in the HathiTrust case the Second Circuit recognizes what is there for all who read Supreme Court opinions to see, that when a use is transformative it is very likely to be fair use, but when it is not transformative, it can still be fair use if a careful analysis of the factors indicates that conclusion. That is what the Second Circuit finds in regard to HathiTrust and its copies for the disabled, and it is what Judge Evans found in GSU. Both were correct decisions in keeping with the clear precedent from the Supreme Court.

Finally, there is the oddity of the Second Circuit panel’s treatment of the fourth fair use factor when it is analyzing the indexing function of HathiTrust. First, the appellate panel calls the fourth factor the most important consideration, and cites the case of *Harper & Row v. The Nation* for that proposition. But the Supreme Court really renounced that position 20 years ago in the “*Oh Pretty Woman*” case, so this is the first part of the oddity. The Second Circuit then goes on to define the idea of market harm very narrowly, saying that the only harm to a market that is recognized for the purpose of the fourth fair use factor is when “the secondary use serves as a substitute for the original work.” This seems to be how the court aligns itself with the ruling in “*Pretty Woman*,” but it is a strange way to get there. The effect of this proposition is to rule out consideration of almost all licensing markets when looking at the fourth factor. This is a conclusion that must be causing serious heartburn in the publishing community. While the Authors Guild continues to make fair use easier and more inclusive with their absurd litigation campaign, they cannot be winning themselves many friends amongst rights holders.

The bottom line is that this decision is very good for libraries and others who depend on fair use. It adds another precedent and some additional bits of analysis to our claims of fair use. But we should recognize that it grows out of what was a very dumb lawsuit to begin with. As is so often the case, we should be emboldened by this ruling, but not too much. The best protection the library community has against aggressive litigation is still, as it always has been, careful and responsible reflection. In that context, fair use is an increasingly safe option for us.

# Attention, intention and value

*Mon, 14 Jul 2014 11:22:40, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

How should we understand the value of academic publications? That was the question addressed at the ALA Annual Conference [last month during the SPARC/ACRL Forum](#). The forum is the highlight of each ALA conference for me because it always features a timely topic and really smart speakers; this year was no exception.

One useful part of this conversation was a distinction drawn between different types of value that can be assigned to academic publications. There is, for example, the value of risk capital, where a publication is valued because someone has been willing to invest a significant amount of money, or time, in its production. Seeing the value of academic publications in this light really depends on clinging to the scarcity model that was a technological necessity during the age of print, but which is increasingly irrelevant. Nevertheless, some of the irrational opposition we see these days towards open access publications seems to be based on a myopic approach that can only recognize this risk value; because online publication can be done more inexpensively, at both production and consumption, and therefore does not involve the risk of a large capital investment, it cannot be as good. Because the economic barrier to entry has been lowered, there is a kind of “they’ll let anyone in here” elitism in this reaction.

Another kind of value that was discussed is the cultural value that is supposedly infused into publications by peer-review. In essence, peer-review is used as a way to create a different, artificial type of scarcity — amongst all the material available in the digital age, peer-review separates and distinguishes some as having a higher cultural value.

Of course, there is another way to approach this kind of winnowing valuable material from the booming, buzzing confusion; one could look at how specific scholarship has been received by readers. That is, one could look at the value created by attention. We are especially familiar with attention value in the age of digital consumerism because we pay attention to Amazon sales figures, we seek recommendations through “purchased together” notes, and we look at consumer reviews before booking a hotel, or a cruise, or a restaurant. Some will argue that these parallels show that we cannot trust attention value; it is only good for inconsequential decisions, the argument goes. But figuring out how to use attention as a means to make sound evaluations of scholarship — better evaluations than we are currently relying on — is the focus of the movement we call “alt-metrics.”

Before we discuss attention value in more detail, however, we need to acknowledge another unfortunate reminder that the cultural value created by peer-review may be even more suspect and unreliable. Last week we saw a troubling incident that provokes fundamental doubts about peer-review and how we value scholarly publications when [Sage Publishing announced](#) the retraction of sixty articles due to a “peer-review ring.” Apparently a named author used fake e-mail identities, and maybe some cronies, in order to review his own articles and to cite them, thus creating an artificial and false sense of the value of these articles. Sage has not made public the details, so it is hard to know exactly what happened, but as [this article points out](#), the academic world needs to know — deserves to know — how this happened. The fundamental problem that this incident raises is the suggestion that an author was able to select his own peer-reviewers and to direct the peer-review requests to e-mails he himself had created, so that the reviewers were all straw men. Although all the articles were from one journal, the real problem here is that *the system for peer-review* apparently simply is not what we have been told it is, and does not, in fact, justify the value we are encouraged to place on it.

Sage journals are not inexpensive. In fact, the [recent study of “big deal” journal pricing by Theodore Bergstrom and colleagues](#) (subscription required), notes that Sage journal prices, when calculated per citation (an effort to get at value instead of just looking at price), are ten times higher than those for journals produced by non-profits, and substantially higher even than Elsevier prices. A colleague recently referred to Sage journals in my hearing as “insanely expensive.” So it is a legitimate question to ask if we are getting value for all that money. One way high journal prices are often justified, now that printing and shipping costs are mostly off the table, is based on the expertise required at publishing houses to manage the peer-review system. But this scandal at the *Journal of Vibration and Control* raises the real possibility that Sage actually uses a kind of DIY system for peer-review that is easily gamed and involves little intervention from the publisher. How else could this have happened? So we are clearly justified in thinking that the value peer-review creates for consumers and readers is suspect, and that attention value is quite likely to be a better measure.

Attention can be measured in many ways. The traditional impact factor is one attempt to analyze attention, although it only looks at the journal level, measures only a very narrow type of attention, and tells us nothing about specific articles. Other kinds of metrics, those we call “alt-metrics” but ought to simply call metrics, are able to give us a more granular, and hence more accurate, way to evaluate the value of academic articles. Of course, the traditional publication system inhibits the use of these metrics, keeping many statistics proprietary and preventing cross-platform measurements. Given the Sage scandal, it is easy to see why such publishers might be afraid of article-level measures of attention. The simple fact is that the ability to evaluate the quality of academic publications in a trustworthy and meaningful way depends on open access, and it relies on various forms of metrics — views, downloads, citations, etc. — that assess attention.

But the most important message, in my opinion, that came out of the SPARC/ACRL forum is that in an open access environment we can do better than just measuring attention. Attention measures are far better than what we have had in the past and what we are still offered by toll publishers. But in an open environment we can strive to measure intention as well as attention. That is, we can look at why an article is getting attention and how it is being used. We can potentially distinguish productive uses and substantive evaluations from negative or empty comments. The goal, in an open access environment, is open and continuous review that comes from both colleagues and peers. This was an exciting prospect when it was raised by Kristen Ratan of PLoS during the forum, where she suggested that we should develop metrics similar to the author-to-author comments possible on [PubMed Commons](#) that can map how users think about the scholarly works they encounter. But, after the Sage Publishing debacle last week, it is easier to see that efforts to move towards an environment where such open and continuous review is possible are not just desirable, they are vital and very urgent.

# Planning for musical obsolescence

*Mon, 28 Jul 2014 07:18:35, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: libraries, category: licensing, category: technologies]*

Gustavo Dudamel is one of the most celebrated conductors of his generation. As Music Director of both the Los Angeles Philharmonic and the Simon Bolivar Orchestra of Venezuela, he has built a solid and enthusiastic following amongst lovers of symphonic music. He is also, according to his [website bio](#), deeply committed to “access to music for all.” So it is particularly poignant that a recording by Dudamel should serve as the prime example of a new access problem for music.

When Dudamel and the Los Angeles Philharmonic release a new recording of a live performance of Hector Berlioz’s *Symphonie Fantastique*, it should be a significant event, another milestone in the interpretation of that great work. But in this particular case we are entitled to wonder if the recording will really have any impact, or if it will drop into obscurity, almost unnoticed.

Why would such a question arise? Because the Dudamel/LA Philharmonic recording was released only as a digital file and under licensing terms that make it impossible for libraries to purchase, preserve and make the work available. When one goes to the [LA Philharmonic site about this recording of Symphonie Fantastique](#) and tries to purchase it, one is directed to the iTunes site, and the licensing terms that accompany the “purchase” — it is really just a license — restrict the user to personal uses. Most librarians believe that this rules out traditional library functions, including lending for personal listening and use in a classroom. Presumably, it would also prevent a library from reformatting the work for preservation purposes in order to help the recording outlive the inevitable obsolescence of the MP3 or MP4 format. Remember that the section 108 authorization for preservation copying by libraries has restrictions on digital preservation and also explicitly allows contractual provisions to override that part of the law.

At a recent consultation to discuss this problem, it was interesting to note that several of the lawyers in the room encouraged the librarians to just download the music anyway and ignore the licensing terms, simply treating this piece of music like any other library acquisition. Their argument was that iTunes and the LA Philharmonic really do not mean to prevent library acquisitions; they are just using a boilerplate license without full awareness of the impact of its terms. But the librarians were unwilling. Librarians as a group are very law-abiding and respectful of the rights of others. And as a practical matter, libraries cannot build a collection by ignoring licensing terms; it would be even more confusing and uncertain than it is to try to comply with the myriad licensing terms we encounter every day!

In the particular case of the Dudamel recording of Berlioz, we know rather more about the situation than is normal, because a couple of intrepid librarians tried valiantly to pursue the issue. Judy Tsou and John Vallier of the University of Washington tracked the rights back from the LA Philharmonic, through Deutsche Grammophon to Universal Music Group, and engaged UMG in a negotiation for library-friendly licensing. The response was, as librarians have come to expect, both inconsistent and discouraging. First, Tsou and Vallier were told that an educational license for the download was impossible, but that UMG could license a CD. Later, they dropped the idea of allowing the library to burn a CD from the MP3 and said an educational license for download was possible, but only for up to 25% of the “album.” For this 25% there would be a \$250 processing fee as well as an unspecified additional charge that would make the total cost “a lot more” than the \$250. Even worse, the license would be limited to 2 years, making preservation impossible. The e-mail exchange asserts that UMG is “not able” to license more than 25% of the album for educational use, which suggests that part of the

problem is that the rights ownership and licensing through to UMG is tangled. But in any case, this is an impossible proposal. The cost is absurd for one quarter of an album, and what sense does it make for a library to acquire only part of a performance like this for such a limited time? Such a proposal fundamentally misunderstands what libraries do and how important they are to our cultural memory.

Reading over the documents and messages in this exchange, it is not at all clear what role Maestro Dudamel and the LA Philharmonic have in this mess. It is possible that they simply do not know how the recording is being licensed or that it is unavailable for libraries to acquire and preserve. Or they may think that by releasing the recording in digital format only they are being up-to-date and actually encouraging access to music for everyone. In either case, they have a responsibility to know more about the situation, because the state of affairs they have allowed impedes access, in direct contradiction to Maestro Dudamel's express commitment, and it ensures that this recording will not be part of the ongoing canon of interpretation of Berlioz.

As far as access is concerned, the form of its release means that people who cannot afford an MP3 player will not be able to hear this recording. Many of those people depend on libraries, and that option will be closed to them because libraries cannot acquire the album. Also, access will become impossible at that inevitable point in time when this format for digital music becomes obsolete. Maybe UMG and the Philharmonic will pay attention and release the recording on a different format before that happens, but maybe they won't. The most reliable source of preservation is libraries, and they will not be there to help with this one. So access for listeners 20 or 30 years from now is very much in question.

This question of the future should have great consequence for Maestro Dudamel and the orchestra. Without libraries that can collect their recording, how will it be used in classrooms in order to teach future generations of musicians? Those who study Berlioz and examine the performance history of the *Symphonie Fantastique* simply may not know about this performance by Dudamel and the LA Philharmonic. That performance, regardless of how brilliant it is, may get, at best, a footnote in the history of Berlioz — "In 2013 the *Symphonie Fantastique* was recorded by the LA Philharmonic under the baton of Gustavo Dudamel; unfortunately, that recording is now lost." These licensing terms matter, and without due attention to the consequences that seemingly harmless boilerplate like "personal use only" can produce, a great work of art may be doomed to obscurity.

# Signing My Rights Away (a guest post by Jennifer Ahern-Dodson)

*Thu, 07 Aug 2014 08:42:54, ksmith12@duke.edu, [category: authors-rights, category: scholarly-publishing, category: technologies]*

NOTE — Authorship can be a tricky thing, impacted by contractual agreements and even by shifting media. In this guest post by Jennifer Ahern-Dodson of Duke’s Thompson Writing Program we get an additional perspective on the issues, one that is unusual but might just become more common over time. It illustrates nicely, I think, the link between authorship credit, publication agreements and a concern for managing one’s online identity. A big “thank you” to Jennifer for sharing her story:

## Signing My Rights Away

### Jennifer Ahern-Dodson

I stared at my name on the computer screen, listed in an index as a co-author for a chapter in a book that I don’t remember writing. How could I be published in a book and not know about it? I had Googled my name on the web (what public digital humanist [Jesse Stommel](#) calls the Googlesume), as part of my research developing a personal website through the [Domain of One’s Own project](#), which emphasizes student and faculty [control of their own web domains](#) and identities. Who am I online? I started this project to find out.

I was taken aback by some of what I found because it felt so personal—my father’s obituary, a donation I had made to a non-profit, former home addresses. All of that is public information, so I shouldn’t have been surprised, but then about four screens in I found my name listed in the table of contents for a book I’d never heard of. Because the listed co-author and I had collaborated on projects before, including national presentations and a journal publication, I wondered if I had just forgotten something we’d written together.

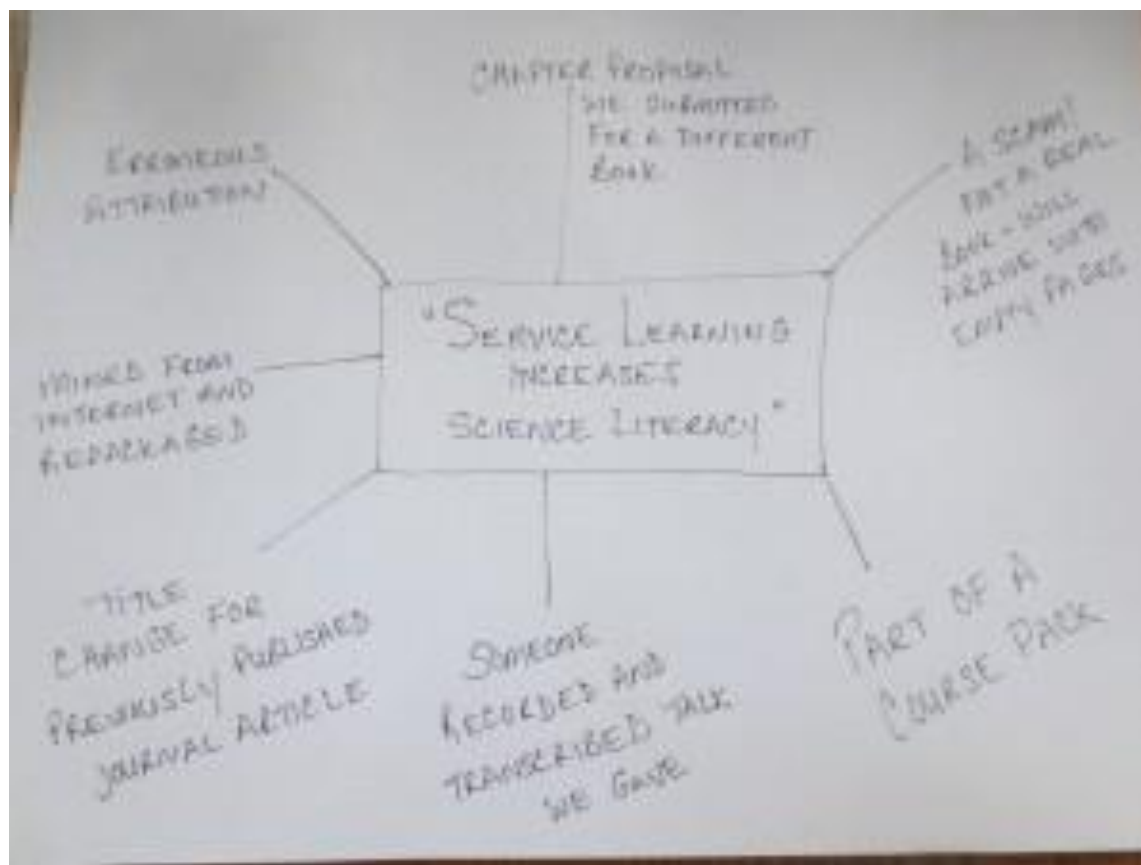
I emailed her immediately and included a screenshot of the index page. Subject line: “Did we write this?”

She wrote back a few minutes later.

WHAT??!!! We have a book chapter that we didn’t even know about???!!!!! How is this possible? Ahahahahahahaha!!!!

It’s a line for our CV! But, wait, what is this publication? Do we even want to list it? Would we list it as a new publication? Is it even our work? How did this happen?

This indeed was a mystery. At the time this was all unfolding, I was participating in a multidisciplinary faculty writing retreat. Once I shared the story with fellow writers, they enthusiastically joined in the brainstorming and generated a wide range of theories including plagiarism, erroneous attribution, a reprint, and an Internet scam (see Figure below). I mapped the possibilities for this curious little chapter called “Service Learning Increases Science Literacy,” listed on page 143 of the book *National Service: Opposing Viewpoints (2011)*[1].



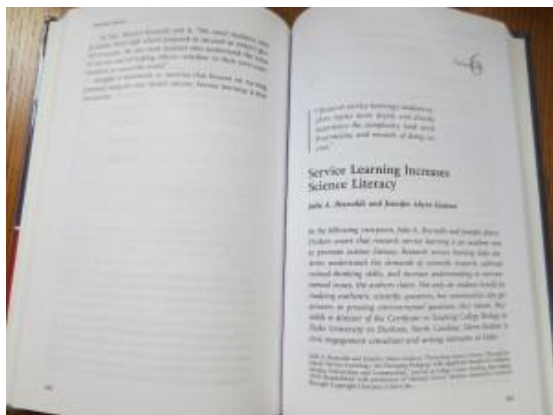
I needed to do more research and so requested the book through Interlibrary Loan and purchased it online as well.

And then there was the story of the editor. Who was she? Did she really exist? Was she a robot editor—just a name added to the front of a book jacket? I started wondering, now that so much of our work is digitized, are robots reading—and culling through—our work more than people? A quick search on Google revealed she was the editor for over 300 books, mostly for young adults. Follow up searches on LinkedIn and Google+ revealed profiles that seemed authentic.

### **The book arrives.**

About a week later, the book arrived through Inter-library Loan. While still standing at the library service desk, I quickly flipped to page 143.

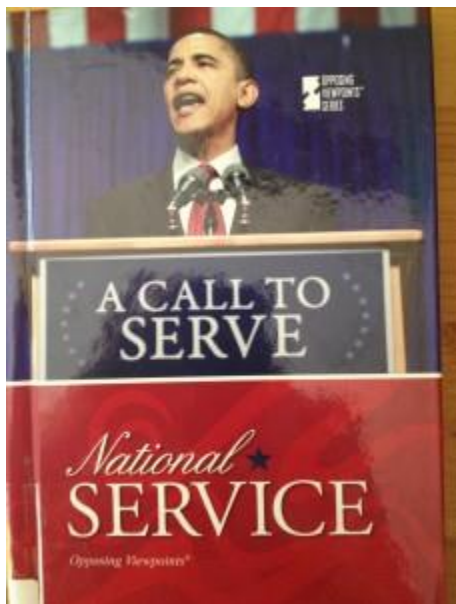




What I discovered is a reprint (with a new title) of an article my author and I had published in the *Journal of College Science Teaching*.<sup>[2]</sup> It was republished with permission through the journal, conveyed through Copyright Clearance Center. The table of contents included a range of authors and works, including an excerpt from a speech by George W. Bush.

It all looked legitimate. But how could I be published and not know about it?

In an email conversation with Kevin Smith, my university's scholarly communication director and copyright specialist, I learned that typically in publication agreements, authors transfer copyright to the organization that publishes the journal. From then on, the organization has nearly total control. It can do what it wants with the article (like republish it or modify it), and for most other uses I might want to make (like including it on my website), I'd have to ask their permission.



I also learned that republication is not uncommon. Although this book is marketed as “new,” it is in fact really just repackaged material from other sources that libraries likely already have. In this case, our article for a college teaching journal was repackaged for an audience of high school teachers as part of an opposing viewpoints series, essentially marketing the same content to a different audience.

In a slightly different repackaging model, MIT Press has started re-publishing scholarly articles from its journals in a thematically curated eBook series called [Batches](#).

These two models made visible for me the ways that copyright, institutional claims, and the Internet fuel change at a pace so rapid it seems almost impossible for authors to keep up.

### **Where to go from here**

Although the ending to this mystery is not as thrilling as I thought it would be (someone plagiarized our work! Someone recorded and transcribed a talk! The book is a scam!), what I uncovered was this whole phenomenon of book republishing. Our chapter was legitimately repackaged in a mass marketed book with copyright secured, which allowed our work to be shared with a broader audience (which I see as a good thing). Yet, the process distanced me from my work in a way I was not expecting. In my naïve, yet I suspect widely held view of academic authorship, I assumed the contract I had signed was simply a formality, more of a commitment by the journal to publish the article and an agreement by my co-author and me to do so. I only skimmed the contract, distracted perhaps by the satisfaction of getting published and the opportunity to circulate my ideas more broadly.

As I submerged myself into the murky depths of republishing, I started to think about my own responsibility as both a writer and a teacher of undergraduate writers, to educate myself on authors' rights. Could I negotiate publishing agreements to retain copyright? Or, at the very least, could I secure flexibility to re-use my work? As it turns out, yes. The Scholarly Publishing and Academic Resources Coalition has created an [Author Addendum](#) to help authors manage their copyright and [negotiate with publishers](#) rather than relinquishing intellectual property.

Although it is not uncommon for publishers to ask authors to sign over their legal rights to their work, at least one publisher—Nature Publishing, which includes the journals *Scientific American* and *Nature*—goes even farther. It requires authors not only to waive their legal rights but also their “moral rights.” Under this agreement, work could conceivably be republished without attribution to the original author. There was a story about this a couple of months ago, see <http://chronicle.com/article/Nature-Publishing-Group/145637/>.

In my case, I clearly did not do due diligence as an author when I read and signed the agreement for the science literacy article, and neither the journal nor the book editor or publisher was under any legal obligation to notify me that my work was republished or retitled. I wonder, however, what would happen if we applied the concept of academic hospitality to our publishing relationships. Could a simple email notification when/if our work gets republished be a kind of professional courtesy we can expect? Or, should we as authors get more comfortable with less control over our work and choose to share our ideas more liberally in public domains in addition to academic journals, which have limited readership and at times draconian author agreements? Do institutions have any role to play in educating their faculty and graduate students about signing agreements?

In my quest to create a domain of my own, to “reclaim the web” and be an agent in crafting my own author identity online, I discovered that, in fact, I had given up control of some of my own work. Now, I’m aware of the need to balance going public with my work—both online and in print—with a thoughtful and informed understanding of my rights and responsibilities as an academic author.

[1] Gerdes, Louise, Ed. Greenhaven Press.

[2] Reynolds, J. and Ahern-Dodson, J. *"Promoting science literacy through Research Service-Learning, an emerging pedagogy with significant benefits for students, faculty, universities, and communities."* *Journal of College Science Teaching* 39.6 (2010).

# Who owns that journal? — an update

Wed, 13 Aug 2014 14:29:38, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: scholarly-publishing]

Earlier this year [I wrote about a lawsuit](#) involving the Duke University Press and their dispute with the Social Science History Association over who would control the journal *Social Science History*. A decision from the trial court in North Carolina has now been issued in the case, so it seems like a good time to update the story.

In my earlier post, I summarized the facts of the dispute this way:

The SSHA has informed DUP that it wants to end its long-standing association and look for a different publisher for its flagship journal, *Social Science History*. The Press, however, asserts that language in their original contract means that the SSHA can stop participating in the journal, but cannot remove it from the control of DUP

I also said that there was probably more to the case than met the eye, and the facts recounted in the [District Court decision](#), which is a summary judgment based on the documents filed by both parties, seem to confirm that.

The District Court's account of the facts of the dispute really helps explain that unusual language that is at the heart of the case — "Discontinue participation in publishing the journal." This is very odd language, and it turns out to come about because of an extraordinary agreement. Apparently in 1996 the Social Science history Association felt they were unable to support the journal anymore, and Duke University Press agree to take over the financial responsibility. DUP collected dues for the SSHA, took all the risks of publishing the journal, and returned 50% of the dues income to the SSHA each year. The unusual language about withdrawal of participation comes from this 1996 agreement, which the SSHA decided it wanted to terminate in 2012, after soliciting new bids for publishing services from other academic publishers.

The other facts I found especially interesting involved the move by the SSHA to pressure Duke Press regarding its interpretation of the agreement, by contacting third parties like HighWire Press, which distributes Duke Press journals online, and demanding that they withhold payment of monies apparently due to DUP because of the conflict. When the lawsuit was filed, the SSHA alleged that Duke Press had violated the agreement and infringed SSHA's copyright by publishing an electronic version of the journal.

Apparently the full complaint included seven distinct claims made by the SSHA against Duke Press, and three counterclaims by the Press. So disentangling the decision is difficult. But it comes down to two key findings.

First, the court holds that the unusual language about withdrawing from participation must be interpreted in light of the agreement as a whole and the intent of the parties that it expresses. While acknowledging that the interpretation offered by the Press is possible if the wording is read in isolation, overall the court determines that the ownership of the journal always remained with the SSHA. So on that central issue — who owns the journal and has the right to determine its future — it is the Association rather than the Press, and the Court finds that the 1996 agreement was terminated as of Jan. 1, 2014.

The Association is therefore free to find another publisher, and I think my speculation that the journal will move to a large commercial press that will return higher profits to the Association will be justified. I am very confident that we will see a significant hike in the cost of *Social Science History*.

The other important holding in this decision is that Duke Press was not in breach of contract or committing copyright infringement when it published the journal electronically. The court holds that authorization for such publication, while not explicitly included by the 1996 agreement, “is implied by the plain terms of the agreement and is evidenced by the actions of the parties.” Specifically, the SSHA knew about electronic publication for years, but only objected to it when its efforts to terminate the agreement led to conflict. It was the SSHA, the court finds, that breached the agreement by causing third parties to withhold funds due to DUP, and the court orders the SSHA to relinquish all claim to those monies.

This case seems both unusual and unfortunate to me. It is unusual because the specific circumstances that led to the conflict are unlikely to be repeated; it does not set any precedent that we all must now be cognizant of. It is unfortunate, first, because it pitted two venerable and respected academic organizations against each other. And even more disturbing is that this is as an illustration of the baleful effects that can result from the large amounts of money that commercial publishing extracts from the academy, and the temptation to get in on the profits.

# About that simian selfie

*Sun, 10 Aug 2014 07:52:52, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: public-domain]*

By now, most people know about the macaque monkeys that took pictures of themselves in the Indonesian jungle, and the controversy over who, if anyone, owns a copyright in the resulting pictures. The events actually took place several years ago, but the popular news media has recently picked up the story because of threats by the photographer whose cameras were used, David Slater, to sue Wikipedia if the photographs, which Slater says are his intellectual property, are not taken down. Wikipedia refused his take down request, and the story has gone viral. I know a copyright story has penetrated into popular culture when I am asked about it at home, over the dinner table!



There has been so much commentary, including an [impassioned defense of the rights of monkey artists](#), that I am hesitant to wade into the fray. But I think there are some lessons we can learn from both the story and people's reaction to it; there is an opportunity here to remind ourselves of some basic principles about copyright law.

So let me offer two comments about the controversy itself, and two comments about the public reaction to it.

First — cards on the table — I am inclined to believe that these photos do not have any copyright protection because they lack any element of human agency. The fundamental principle of copyright law, stated very early in the U.S. law, is that copyright protects “works of authorship.” And although I never really thought the idea would be challenged, I think authorship implies human agency. There must be a spark of creative, a decision to create a work, for something to be a work of authorship, and these photos do not have that. The story has shifted a bit over time, but it does not appear that Mr. Slater gave his cameras to the monkeys deliberately. Even if he did, that could hardly be called a creative decision. He had no control over what they did with the cameras; they were as likely to smash them on the ground as to take pictures.

In the well-known *Feist* decision about the white pages of phone books, the Supreme Court discussed the idea of a work of authorship, and told us that mere hard work — sweat of the brow, as they said — does not by itself earn copyright protection. A work of authorship must be original in the sense of not copied, but it also must have a spark of human creativity. It need not be much, but some human decision is required.

By the way, the *Feist* decision is a roadmap to why Mr. Slater's arguments about the money and effort that went into his photo-taking trip to Indonesia do not succeed in convincing me that he should have a

copyright in these specific photos. His other argument, that the monkeys [stood in the shoes of a hired assistant](#), such that Mr. Slater should own the copyright in these photos as the “employer,” also fails, if it were ever seriously proposed. For one to be an independent contractor, human agency is again required. In U.S. law, there must be an explicit agreement before any copyrighted work created by a contractor could be considered work for hire. And monkeys do not have legal capacity to enter into a contract. This is a legal point; no matter how smart other creatures are or the degree to which humans should recognize animal rights, the law, including copyright and contract, deals with relationships between human beings.

Human relations are the foundation of my other legal point about this situation. We need to remember that copyright has a specific incentive purpose; it is designed to reward creators so that they will continue to create. The law grants a government-enforced monopoly so that authors and other creators can make enough money to support their creative efforts. And this justification completely fails when the creator is not a participant in human society. Granting a copyright in a monkey-taken photograph would be a mockery of the incentive purpose of the law.

Mr. Slater seems to argue the incentive purpose of copyright when he asserts that it takes a lot of hard work and investment to be a photographer, and only a few of the many photos he takes will make any money. All true, I am sure, but not relevant. This is not a photo that he took, and it does not meet the standard of a work of authorship eligible for the peculiar legal structure we humans call copyright. Many reactions to this story have focused on the idea that it is somehow unfair to deny Mr. Slater profit from the photo. But copyright law is not about fairness, nor does it exist to reward industry or protect an investment. Laws are passed for many purposes, and fairness is often well down on the list of reasons. It is silly to expect to be able to use copyright to leverage some result considered “fair” in every situation that involves an (apparently) creative work.

My final observation about the reactions this story has provoked is actually eloquently made by Mike Masnick of TechDirt when he writes about [“How that monkey selfie reveals the dangerous belief that every bit of culture must be owned.”](#) It is curious to see how uncomfortable many people are with the idea that no one at all owns these photos; that they are therefore the property of everyone. Perhaps it is the unfortunate influence of the big content industries that makes some people uncomfortable with the idea of the public domain. One of the early articles in this new round of media coverage asked its readers to vote on who owned the copyright in the photo. Most voters split between Mr. Slater and the monkey, with less than 17% being willing to assert that no one owned it, it was in the public domain. And apparently Wikipedia has [decided to let the public vote](#) on continuing to make the photo available.

Maybe the real lesson we should take from this silliness is that the public domain is real, and it is important. Much of human culture would not have been possible without free access to our shared literary and artistic heritage. The U.S. Constitution builds a public domain in to the very words by which it gives Congress the power to pass copyright laws, by requiring that those rights be “for a limited time.” We cannot have copyright without a public domain; to attempt that would be cultural suicide. So we need to learn not just to accept the public domain, but to celebrate it. Perhaps that is why the monkey is smiling,

# MOOCs and student learning

*Tue, 02 Sep 2014 13:24:44, ksmithl2@duke.edu, [category: technologies]*

Now that the MOOC on Copyright for Educators and Librarians has finished its first run, it seems like a good time to post some reflections on what I learned from the experience.

The first thing I learned is that offering a MOOC takes a lot of work, and it is easier when that work is shared. In my case, I was working with two wonderful colleagues — Anne Gilliland from the University of North Carolina, Chapel Hill and Lisa Macklin from Emory — who made the effort of putting the course together much more pleasant. Both are lawyers and librarians with lots of experience teaching the issues we were dealing with, and we are all friends as well, which made the whole process a lot easier. We also benefited from the terrific support we got from consultants working for Duke's Center for Instructional Technology, which may be the single most MOOC-savvy group at any university.

That we had a great team was not really a surprise. I was a bit more surprised however, and quite pleasantly, by the quality of the student discussion in our MOOC. I had heard from other instructors about how effective the online discussion forums could be, but was just a bit skeptical. Then I was able to watch as MOOC participants would pose difficult questions or struggle with the application of copyright law to a particular situation, and repeatedly the other course participants would work through the problem in the forums and arrive at surprisingly good answers. Peer-to-peer teaching is a reality in MOOCs, and is certainly among the best features of these courses.

One thing we know about MOOCs is that they often have participants with considerable background in the topic; often they have enrolled for a refresher or to see how someone else teaches the topic. These people are a great asset in the MOOC. Even if they are not amongst the most-likely participants to complete a course according to whatever formula for completion is in place, they are tremendously important to the success of the course because of the contribution they make to peer-learning in the discussion forums.

Acknowledging the contribution of “expert students” also offers a reminder to MOOC instructors to take a more humble approach to the standards we set for completion of our courses. The open and online nature of these courses means that students enroll with a wide variety of goals in mind. As I just said, some are experts looking to see how others teach the topic. Completion of quizzes and such may be unimportant to such participants, even though they are getting valuable career or personal development from the course.

Along these lines, I agree wholeheartedly with [this essay by Jeff Pomerantz about apologies](#) for failing to complete a course. Like Jeff, my colleagues and I got multiple e-mails in which participants explained their “failure” to complete the course. Like Jeff, we often smiled to ourselves and chocked those messages up to a misunderstanding of what MOOCs are. And like Jeff, we learned that there are so many reasons for taking a course, so many different goals that participants bring to their involvement, that it is more likely we instructors who need to get a better understanding of MOOCs.

Many of the participants in our specific course were librarians and educators; they were our target audiences, so that makes sense. These are groups that take assignments and course completion very seriously, which was reflected in our very high completion rate (over 15%). But it also means that these were folks who wanted to explain to us when they were not going to complete the course according to official standards. Maybe they did not realize that we were unable to track participation at an individual



level due to the technology and the volume of students. Nevertheless, we needed to treat their desire to explain with respect, and to recognize that many of those who did not earn a certificate of completion probably got what they wanted from the course, and also very likely made important contributions to what other participants learned.

Last week I attended a meeting of Duke's MOOC instructors, which focused on discussions about how we can use data available about the MOOCs to learn more about the teaching and learning process. It was a fascinating meeting on several levels, but one thing I got from it was two stories about the kinds of goals that MOOC participants might have.

- One faculty member who had taught a MOOC explained incidentally his own motivation for taking a different online course. His own career as a student had been so focused on his own specialty that he had never gotten a chance to take a basic course in a different field that had always interested him. "There was so much to learn," he said, "and so little time." A MOOC gave him a chance to fill that long-felt gap, and I will bet that he was a valuable student to have in the course; very highly motivated, like so many MOOC participants, whether or not he finished the assignments that lead to completion.
- One of the administrators of Duke's online initiative told about overhearing two students discussing the fact that each was taking a MOOC, and interrupting the conversation to ask why each had enrolled. One of the women was a Ph.D. student who explained that there were certain areas of study or skills that she needed to complete her dissertation that were most efficiently gained by taking parts of a MOOC or two. She registered in order to listen to selected videos that have relevance for her specific research. She is a perfect example of someone who will not count toward a completion statistic but who is gaining something very valuable through her participation.

The other thing I learned from this meeting about potential research enabled by MOOCs is the myriad ways that these online courses can help improve teaching and learning on our own campus. Duke has said all along that improving the experience of our own students was an important goal of our involvement with MOOCs. When I heard this, I usually thought about flipped classrooms. But that is a very small part of what MOOCs can do for us, I discovered. I was privileged to listen to a comprehensive discussion about how the data we gather from MOOCs can be used to improve the student experience in our regular classrooms. Very specific questions were posed about the role of cohorts, the impact of positive and negative feedback, how we can harness the creative ideas students raise during courses, and how to better assess the degree to which individual students have met the unique goals they brought to the course. All of this has obvious application well beyond the specific MOOC context.

The most important thing I learned from the experience of teaching a MOOC actually has little to do with online courses as such. It is a renewed respect for the complexity and diversity of the learning process itself, and a sense of awe at being allowed to play a small role in it.

# How useful is the EU's gift to libraries?

*Tue, 16 Sep 2014 08:40:19, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

On Thursday the European Union's Court of Justice [issued an opinion](#) that allows libraries to digitize books in their holdings and make those digital copies accessible, on site, to patrons. In a way, this is a remarkable ruling that recognizes the unique place of libraries in the dissemination and democratization of knowledge. Yet the decision does not really give libraries a tool that promises to be very useful. It is worth taking a moment, I think, to reflect on what this EU ruling is, what it is not, and how it compares to the current state of things for U.S. libraries.

There are news stories about the EU ruling [here](#), [here](#) and [here](#).

What the EU Court of Justice said is that, based on the EU "Copyright Directive," libraries have permission to make digital copies of works in their collections and make those copies available to patrons on dedicated terminals in the library. The Court is interpreting language already found in the Directive, and adding two points. First, library digitization is implied by the authorization for digital copies on dedicated terminals contained in the Directive, and, second, that this is permissible even if the publisher is offering a license agreement. Finally, the Court makes clear that this ruling does not permit further distribution of copies of the digitized work, either by printing or by downloading to a patron's storage device.

As far as recognizing what this decision is not, it is very important to realize that it is not the law in the United States. It is easy sometimes, when the media gets ahold of a copyright-related story, to forget that different jurisdictions have different rules. The welter of copyright information, guidelines, suggestions and downright misinformation can make the whole area so complex that simple principles can be forgotten. So let's remind ourselves that this interesting move comes from the European Union Court of Justice and is the law only for the EU member states.

The other thing this ruling is not is broad permission for mass digitization. The authorization is restricted to copies that are made available to library patrons on dedicated terminals in the library. It does not permit wide-spread distribution over the Internet, just "reading stations" in the library. That restriction makes it unlikely, in my opinion, that many European libraries would invest in the costs of mass digitization just for such a relatively small benefit.

So how does this ruling in the EU compare to the rights and needs of libraries in the U.S.?

Let's consider section 108(c) of the U.S. copyright law, which permits copying of published works for preservation purposes. That provision seems to get us only a little way toward what the EU Court has allowed. Under 108(c), a U.S. library could digitize a book if three conditions were met. First, the digitization must be for the purpose of preserving a book from the collection that is damaged, deteriorating, or permanently missing. Second, an unused replacement for the book must not be available at a fair price. Third, the digital copy may not be made available to the public outside of the library's premises. This last condition is similar, obviously, to the EU's dedicated terminal authorization; a patron can read the digital copy only while present in the library.

Two differences between the EU ruling and section 108(c) are especially interesting:

1. The works for which this type of copying are allowed in the U.S are much more limited. The EU says that libraries can digitize any book in their collection, even if it is not damaged or deteriorating, and even if another copy, even a electronic one, could be purchased. This seems like the major place where the EU Court has expanded the scope for library digitization.
2. On the other hand, the use of a digital copy may be less restricted in the U.S. Instead of a dedicated terminal, a U.S. library could, presumably, make the copy available on a restricted network, so that more than one patron could use it at a time, as long as all of them were only able to access the digital copy while on the library premises.

In the U.S., of course, libraries also can rely on fair use. Does fair use get us closer to being able to do in the U.S. what is allowed to European libraries? Maybe a little closer. Fair use might get us past the restriction in 108(c) about only digitizing damaged books; we could conceivably digitize a book that did not meet the preservation standard if we had a permissible purpose. And the restriction of that digitized book to in-library use only would help with the fourth fair use factor, impact on the market. But still we would have issues about the purpose of the copying and the nature of the original work. Would general reading be a purpose that supports fair use? I am not sure. And what books could we (or could we not) digitize? The specific book at issue in the case before the EU Court was a history textbook. But textbooks might be especially hard for a U.S. library to justify digitizing for even limited access under fair use.

If we wanted to claim fair use for digitizing a work for limited, on site access, my first priority would be to ask why — what is the purpose that supports digitization? Is a digital version superior for some articulable reason to the print copy we own (remembering that if the problem is condition, we should look to 108)? One obvious purpose would be for use with adaptive software by disabled patrons. Also, I would look at the type of original; as I said, I think a textbook, such as was at issue in the EU case, would be harder to justify under U.S. fair use, although some purposes, such as access for the disabled, might do it. Finally, I would look at the market effect. Is a version that would meet the need available? Although the EU Court said that European libraries did not need to ask this question, I think in the U.S. we still must.

Ultimately, the EU Court gave European libraries a limited but useful option here. Unfortunately, in the U.S. we have only pieces of that option available to us, under different parts of the U.S. law. It will be interesting to see whether, in this age of copyright harmonization, U.S. officials begin to reconsider this particular slice of library needs because of what the EU has ruled.

# Are fair use and open access incompatible?

*Thu, 25 Sep 2014 08:46:24, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: open-access-topics, category: scholarly-publishing]*

There has been a spirited discussion on a list to which I subscribe about the [plight of this graduate student who is trying to publish an article that critiques a previously published work](#). I'll go into details below, but I want to start by noting that during that discussion, my colleague Laura Quilter from the University of Massachusetts, Amherst captured the nub of the problem with this phrase: "the incompatibility of fair use with the policies of open content publishers." Laura's phrase is carefully worded; the problem we need to unpack here is about the **policies** of open content publishers, and the solution is to help them understand that fair use and open licensing are NOT incompatible.

Briefly, the situation is this. An author has written a paper that critiques previous work, specifically about the existence, or not, of "striped nanoparticles." In order to assess and refute evidence cited in some earlier papers, the author wants to reproduce some figures from those earlier publications and compare them to imagery from his own research. He has encountered two obstacles that we should consider. First, his article was rejected by some traditional publications because it was not groundbreaking; it merely reinterpreted and critiqued previously published evidence. Then, when it was accepted by PLoS One, he encountered a copyright difficulty. PLoS requires permission for all material not created by the author(s) of papers they publish. One of the publishers of those previous papers — Wiley — was willing to give permission for reuse but not for publication under the Creative Commons Attribution (CC BY) license that PLoS One uses. Wiley apparently told the author that "We are happy to grant permission to reproduce our content in your article, but are unable to change its copyright status."

It is easy to see the problem that PLoS faces here. Once the article is published under a CC license, it seems that there is little control over downstream uses. Even if the initial use of the Wiley content is fair use — and of course it probably is — how can we ensure that all the downstream uses are fair use, especially since the license permits more types of reuse than fair use does? Isn't this why fair use and open licensing are incompatible?

But this may be an overly simplistic view of the situation. Indeed, I think this researcher is caught up in a net of simplified views of copyright and scholarly publication that creates an untenable and unnecessary dilemma. If we start by looking at where each player in this controversy has gone wrong, we may get to a potential solution.

Let's start with Wiley. Are they in the wrong here in any way? I think they are. It is nice that they are willing to grant permission in a general way, but they are probably wrong, or disingenuous, to say that they are "unable" to change the copyright status of the material. Under normal agreements, Wiley now owns the copyright in the previously published figures, so they are perfectly able to permit their incorporation into a CC licensed article. They can "change the copyright status" (if that is really what is involved) if they want to; they simply do not want to. The author believes this is a deliberate move to stifle his criticism, although it is equally possible that it is just normal publishing myopia about copyright.

There is also some blame here for the system of scholarly publishing. The roadblock encountered with traditional publishers — that they do not want articles that are "derivative" from prior work — is common; most scientists have encountered it. In order to generate high impact factors, journals want new, exciting and sexy discoveries, not ongoing discussions that pick apart and evaluate previously

announced discoveries. We have found striped nanoparticles! Don't dispute the discovery, just move on to the next big announcement.

This attitude, of course, is antithetical to how science works. All knowledge, in fact, is incremental, building on what has gone before and subject to correction, addition and even rejection by later research. The standard of review applied by the big and famous scientific journals, which is based on commercial rather than scholarly needs, actually cuts against the progress of science. On the other hand, the [review standard applied by PLoS One](#) — which is focused on scientific validity rather than making a big splash, and under which the article in question was apparently accepted — better serves the scientific enterprise.

But this does not let PLoS off the hook in this particular situation. It is their policies, which draw a too-sharp line between copyright protection and open content, that have created a problem that need not exist.

First, we should recognize that the use the author wants to make of previously published figures is almost certainly fair use. He is drawing small excerpts from several published articles in order to compare and critique as part of his own scholarly argument. This is what fair use exists to allow. It is nice that Wiley and others will grant permission for the use, but their OK is not needed here.

Second, the claim that you cannot include material used as fair use in a CC-licensed article is bogus. In fact, it happens all the time. I simply do not believe that no one who publishes in PLoS journals ever quotes from the text of a prior publication; the ubiquitous academic quotation, of course, is the most common form of fair use, and I am sure PLoS publishes CC-licensed articles that rely on that form of fair use every day. The irony of this situation is that it points out that PLoS is applying a standard to imagery that it clearly does not apply to text. But that differential treatment is not called for by the law or by CC licenses; fair use is equally possible for figures, illustrations and text from prior work, and the CC licenses do not exclude reliance on such fair uses.

Next, we can look at the CC licenses themselves to see how downstream uses can be handled. If we read the [text of the Creative Commons license “deed”](#) carefully, we find these lines:

Licensors should clearly mark any material not subject to the license. This includes other CC-licensed material, or material used under an exception or limitation to copyright.

Obviously, the CC licenses themselves *expect* that not everything that is part of a licensed work will be equally subject to the license; they realize that authors will — indeed must — rely on fair use as one of those exceptions and limitations to copyright. How should licensors mark such material? The most usual way is a footnote, of course. But a caption to the figure that indicates the source of the different pieces and even says that copyrights may be held by the respective publishers would work as well.

Finally, let's acknowledge that there is nothing new or unusual in the procedure recommended above. Traditional publishers have done things this way for years. When Wiley publishes an article or a textbook that asserts that they, Wiley, own the copyright, they are not asserting that they own copyright over the text of every quotation or the images used by permission as illustrations. Such incorporated material remains in the hands of the original rights holder, even after it is included in the new work under fair use or a grant of permission. The copyright in the new work applies to what is new, and downstream users are expected to understand this. Likewise, the partial waiver of copyright

accomplished by a CC license applies to what is new in the licensed work, not to material that is legally drawn from earlier works.

So I think there is a way forward here, which is for PLoS to agree to publish the article with all of the borrowings under fair use or by permission clearly marked, just as they would do if those borrowings were all in the form of textual quotations. And I think we can learn two lessons from this situation:

1. The standard of review applied by open content publishers is more supportive of the true values of science than that used by traditional publishers. Over reliance on impact factor hurts scholarship in many ways, but one of them is by pushing publishers to focus on the next big thing instead of the ongoing scientific conversation that is the core of scholarship. The movement toward open access has given us a chance to reverse that unfortunate emphasis.
2. Open content licenses should not be seen as all-or-nothing affairs, which must either apply to every word and image in a work or not be used at all. To take this stance is to introduce rigidity that has never been a part of our copyright system or of traditional publishing. It would be a shame if excessive enthusiasm for openness were allowed to actually undermine the value of research by making the scientific conversation, with all its reliance on what has gone before, more difficult.

# Jury instructions go missing

*Thu, 09 Oct 2014 09:21:38, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: licensing, category: public-domain]*

Jury instructions are one of those things that few people, not even most lawyers, think about very often. But if you are involved in a trial, they can be vitally important. The ways in which juries are instructed on particular points of law can determine the outcome of a case, so litigants and the lawyers must spend a lot of time arguing over which instruction should be given and how they should be worded. Many appeals revolve around the accuracy and appropriateness of the instructions that were given to a jury.

Because they are so important and potentially so contentious, most states develop model jury instructions, or “pattern” instructions, as they are called in North Carolina, for a great many legal doctrines and situations. Access to these pattern instructions is important for litigants. Although their use is not required in North Carolina, using a pattern instruction creates a presumption that the jury was properly instructed. Also, specific variations that a litigant wants a judge to make in an instruction are best proposed as amendments to the pattern.

I admit that I have never consulted the North Carolina Pattern Jury Instructions. Nevertheless, I was dismayed to receive [this announcement from the North Carolina Bar Association](#) telling me that the free access I had to the Pattern Instructions as a member of the Bar would soon be ending. The story it tells is interesting and instructive.

First, the Pattern Jury Instructions are developed by the North Carolina Conference of Superior Court Judges. That is, they are created by state officials as part of their official duties. But unlike documents created by Federal employees, there is a copyright in these instructions, and that copyright has been given to the University of North Carolina School of Government. The SOG, in turn, has given a vendor called CX Corp an exclusive license to distribute the instructions. For over a decade the Bar Association contracted with CX to provide access as a member benefit to NC lawyers, but that contract is expiring and efforts to renew it have failed. A familiar story to librarians, of course, and probably due to the same, familiar reason that most licensing renewals fail — a demand for more money than the licensee feels it can pay.

For many North Carolina lawyers, the impact of this new regime will be minimal. Medium and large firms will just factor in the cost and effort of getting an individual subscription to the Pattern Jury Instructions. Presumably the UNC School of Government will realize more revenue from this gifted copyright. But I worry about *pro se* litigants and those who are represented by solo practitioners or small firms. Those folks might well be at a disadvantage in a crucial phase of a trial, the debate about how the jury will be instructed. They will either have to scrape up the money to purchase a print or electronic version of the pattern instructions, find one of the relatively few public law libraries where they can consult them, or else risk advocating for instructions that will be more easily challenged and undermined.

From this unfortunate situation, I want to draw two points that I think are of general relevance to those of us who think about copyright matters.

First, it is an important reminder that we cannot assume that public documents intended for a public purpose are necessarily public domain. The familiar provision in U.S. copyright law that puts documents created by the federal government in the public domain is, obviously, only about federal documents.

The states can and sometimes do claim copyright in official state documents. They are often used as revenue sources, especially if there is a target audience of professionals, like building contractors or lawyers, from whom payment can be readily expected.

The problem with this situation is that the different states take different approaches to what is and is not in the public domain, and also that a single state may be wildly inconsistent about its approach to different types of documents it creates. In most states, most official documents are public domain, at least in the practical sense that they are reasonably accessible without cost. But odd things, like building codes or jury instructions or even an electronic [database of the state's laws](#), may be exclusively behind a pay wall.

The other instructive point in this is the realization that copyrights, especially those held by state and local government, may be used to enact policy goals that have nothing to do with copyright. The purpose of copyright is, explicitly, to incentivize creation. Presumably the NC Conference of Superior Court Judges did not need the promise of royalties in order to compile the Pattern Jury Instructions; creating those instructions was simply a part of good judicial practice for the state. So here we had a copyright that wasn't doing any work. What can we do with it; how can we use it to make some money? Here's an idea, let's give it to the UNC School of Government as an added revenue source! They can exploit it in a way that would be inappropriate for the judges, and the state's flagship public university can reap the benefit.

This isn't necessarily a bad idea; at least, the purpose is worthwhile. But it is a public policy that copyright was not intended to serve, and it is worth noting that this can happen, and that not all the policies that are supported this way will be equally laudable. In the ideal world, states would be more transparent about what they claim a copyright in and why. And elected representatives should be given the chance to approve, or not, those policy ends that are furthered by the exploitation of copyrights claimed in state documents. At least that way, there would be some accountability when copyright is used for purposes other than that for which it was instituted.

While I was preparing this post, I encountered a somewhat parallel story about another legal document — the Bluebook that is the required citation manual for law students, lawyers, and litigants in many U.S. courts. [As the blog TechDirt reports](#), this is another case where access for impoverished litigants may be important, but copyright protection allows access restrictions that impose financial barriers. Of course, unlike the Pattern Jury Instructions, the Bluebook is a privately created document, so there is less confusion about the appropriateness of the initial copyright. Nevertheless, Carl Malamud and his Public Resource allies have mounted a campaign asking that the Bluebook be made more accessible and, as it turns out, finding grounds to challenge the continued existence of a copyright in the work. Fascinating reading.



# A reversal for Georgia State

*Fri, 17 Oct 2014 14:23:08, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

The Eleventh Circuit Court of Appeals has issued its ruling in the publisher appeal of a district court decision that found most instances of electronic reserve copying at Georgia State to be fair use. The appellate court ruling is 129 pages long, and I will have much more to say after I read it carefully. But the hot news right now is that the Court of Appeals has reversed the District Court's judgment and remanded the case back for proceedings consistent with the new opinion. The injunction issued by the District Court and the order awarding costs and attorney's fees to GSU have been vacated.

Looking at its analysis of the four fair use factors suggests that applying the Court of Appeals' ruling will be challenging. The panel has held that Judge Evans of the District Court was correct to find that the first factor favored fair use, even though, both courts say, the use is not transformative. The non-profit educational character of the use seems to carry the day on that factor. On the other hand, the Appeals Court finds error in the District Court's sweeping finding that the second factor favored fair use. The panel also disagrees with the 10% or 1 chapter standard used by Judge Evans to decide about the third fair use factor, the amount used; they object to any mechanical standard and want a more nuanced, work-by-work analysis. The Court of Appeals also agrees with the District Court about the fourth factor — largely favoring plaintiffs when a digital license is available. But the 11th Circuit wants the factors to be balanced with a different touch; not treated as all equal.

What is interesting here is that it looks like a considerable victory for the publishers, but there is still a lot of work to do. Judge Evans will need to do her analysis over again, and the results will be different. But given the way the Appeals Court agrees with some parts of her initial analysis and corrects her on others, it is hard to predict, on first glance, what the final result will be.

A copy of the [opinion can be found here](#). I am sure there will be lots more written about the, including by me, in the days to come.

# GSU appeal ruling — the more I read, the better it seems

*Sun, 19 Oct 2014 12:59:35, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

Those of us who heard the oral arguments in the Eleventh Circuit Court of Appeals last November, in which the publishers appeal of the District Court ruling favoring fair use in their copyright infringement lawsuit against Georgia State was heard, mostly [expected a discouraging result](#) from the Appellate panel. An initial or cursory reading of the [opinion issued by the panel of the 11th Circuit](#) on Friday might even confirm those fears. After all, the fairly positive ruling from the District Court is reversed, the injunction and the order for the publishers to pay GSU's costs and attorney's fees are both vacated, and the whole case is remanded back to the District Court to reconsider. But once one begins to read carefully, the panel opinion gets much better. All of the big points that the publishers were pushing, which consequently are the really bad potential rulings for higher education, go against the publishers. In many ways, they won a reversal but lost the possibility of achieving any of their most desired outcomes. Higher ed didn't exactly win on Friday, but the plaintiff publishers lost a lot.

There is a thorough and smart analysis of the ruling from Nancy Sims of the University of Minnesota [found here](#).

For those of us struggling to make responsible fair use decisions on a day-to-day basis, this Appeals Court ruling doesn't actually change much. The message for us is that it could have been much worse, the case is far from over, and we must just keep on making the same kind of reasoned and reasonable fair use decisions we have been making for years.

What we got from the three-judge panel of the Eleventh Circuit on Friday is a mostly negative ruling that outlines where both Judge Evans of the District Court and the plaintiff publishers are wrong, as the panel thinks, about fair use. To be exact, two judges — Tjoflat and Marcus — tell us those things. The third judge, Vinson, concurs in the result — the reversal and remand of the case — but would have accepted virtual all of the publishers arguments and closed the door on fair use for even very small classroom readings. His concurrence suggests that getting an opinion together was probably a difficult process involving a lot of compromise (it took eleven months), and it also tells us how bad the opinion could have been for universities. Instead, what the panel majority issued is mostly bad for the publishers.

In my opinion, there were five major principles that publishers wanted to get from this lawsuit, and in the Appeals Court ruling they lost on all of them:

1. Publishers wanted the Appeals Court to hold that Judge Evans should have ruled based on the big picture — the large number of electronic reserve items made available to students without permission — rather than doing an item-by-item analysis for each reading. Instead, the Appeals Court affirmed that the item-by-item approach was the correct form the analysis should take. This, of course, is the key that allows universities to make individualized fair use decisions, and it rejects the attempt to force all schools to purchase a blanket license from the Copyright Clearance Center (which was, in my opinion, the fundamental goal for which the case was filed in the first place).

2. The plaintiffs wanted a ruling that non-profit educational use did not mean that the first fair use factor always favored fair use. They wanted the Appeals Court to hold that where the copying is non-transformative, and both Judge Evans and the Appeals Court felt that the copying at issue was non-transformative, the first fair use factor does not favor the defendants, even when they are non-profit educational institutions. But the Court of Appeals correctly applied Supreme Court precedent and held that the first fair use factor still favors fair use for such “verbatim” copying when it is done for an educational purpose without profit.
3. The Appeals Court held that the so-called “course pack” cases, which rejected fair use for course packs made for a fee by commercial copy shops, were not controlling precedent in the situation before it, where GSU was doing the copying itself and made no profit from it.
4. The publishers wanted a clear statement that the Classroom Copying Guidelines were a limit on fair use for multiple copies made for classroom use, defining a maximum amount for such copying of 1000 words. They lost there too; the panel held that the Guidelines were intended as a minimum safe harbor and did not define a limit on fair use. Therefore they do not control the decision for this type of copying. Instead, the panel rejected the 10% or one chapter rule applied by Judge Evans as too rigid and instructed her to use a more flexible approach that takes account the amount appropriate for the pedagogical purpose.
5. Finally, the publishers were hoping that the Appeals Court would reject the idea that the availability of a license for a digital excerpt was relevant to the fourth fair use factor; they wanted a rule that says that any unlicensed use is an economic loss for them, even if they have decided not to make the desired license available. They lost that too; the panel affirmed that the District Court was correct to consider the availability of a license for the specific use when evaluating market harm.

These losses, which constitute the heart of what the publishers were hoping to achieve when they brought the lawsuit, are probably final. They are now binding precedent in the 11th Circuit, and persuasive throughout the country. The publishers could presumably appeal to the Supreme Court, but it seems unlikely the current Court would take the case because there is no split amongst the Circuit Courts, only a growing consensus about fair use.

So if the publishers lost on everything that really mattered to them, why was the case reversed?

First, as I have said, this is a big loss for the publisher plaintiffs, but it is not a win for GSU. With the reversal of the District Court ruling and the injunction and fee award vacated, their copyright policy is again up in the air. And, of course, they have lost the immediate prospect of collecting about \$3.5 million in costs. But for now, they, like all libraries, should probably just carry on with their normal practices and wait to see what happens on remand.

When (if?) the case gets back to Judge Evans, who I very much doubt wanted it back, the fair use analysis will look somewhat different. The Appeals panel found specific errors in her analysis of the second and third fair use factors. On the second factor they have told her that she cannot presume that the works in question are all “informational.” She has been told to do a work-by-work evaluation, but also told that this factor is not very important. On the third factor, the amount used, the panel said that her bright-line rule of no more than 10% or one chapter was too rigid (as would have been the much lower bright-line rule the publishers wanted). Here too, the Appeals Court wants a more nuanced and fact-specific analysis, looking at both quantity and quality (the heart of the work). Significantly, they

have told Judge Evans to look at the pedagogical appropriateness of the excerpt when determining how the amount factors into a fair use analysis. Since this corresponds with what many of us tell campus faculty — use only what you really need and no more — it is nice that the panel approved. Finally, Judge Evans has been told to give the fourth factor — market harm — more weight, rather than counting all the factors equally. This would probably, but not certainly, result in fewer findings of fair use. Instead of the split we got — 43 fair uses versus 5 infringements (plus 26 for which there was no *prima facie* showing of infringement) — there would probably be a different division. Maybe 30 excerpts would be fair use and 18 infringing; who knows? But I think we should consider whether or not getting to that point really benefits anyone.

Which brings me to considering what the various players should do now, in light of this ruling.

The publishers, as I say, have pretty much lost even as it looks like they were winning. There is no good that can come out of a remand for them. At best they will get that different division between fair use and infringement as a result, and will be able to use it to spread a little more fear amongst academic libraries about the uncertainty of fair use. But that is not their real goal, I hope. They were hoping to radically change the landscape, and they have failed spectacularly. If there is any common sense left in their board rooms and executive suites, they need to consider settling with Georgia State and then engaging in real, good-faith negotiations with higher education and library groups. Don't open those negotiations with threats, as you did before. We now know how toothless your threats are. But it is still the case that libraries and faculties would like some standards they can follow that are realistic in light of what the courts have told us. There is no windfall for publishers in such negotiations, but there might be some stability, not to mention the savings they will realize if they stop wasting money on foolish and unavailing litigation.

As for academic libraries, this long, drawn-out case, although not over yet, appears to have been much ado about nothing. We still should be making careful, responsible and good-faith decisions about copyright and fair use, just as we have done for years. We need to educate ourselves, look at the array of precedents we have from the federal courts, and continue to do our best. There has been no revolution, and no dramatic alteration of the conditions under which we do our work. The bottom line is that, after this ruling, libraries should just keep calm and carry on.

# Swimming in muddy waters

*Thu, 30 Oct 2014 07:59:13, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

Since the ruling from the Eleventh Circuit Court of Appeals in the Georgia State copyright case came out two weeks ago, most commentators have come to the same conclusions. It is a mostly negative ruling, in which publishers actually lost a lot of what they were fighting for. Georgia State also lost, in the sense that the case is not over for them and they are no longer assured of being reimbursed for their attorney's fees and court costs, as Judge Evans had originally ordered. But apart from those parties to the case, has the library community lost by this decision, or gained? Once again, what we have gained is mostly negative — we know that we do not have to strictly observe the 1976 Classroom Copying Guidelines, we know that the cases involving commercially-produced course packs do not dictate the fair use result for e-reserves, we know that 10% or one chapter is not a bright line rule. But there is little benefit in knowing how NOT to make fair use decisions; it is easy to see why [one commentator has pled for bright line rules](#).

One affirmative point we can take from the case is that we know we still can, and must, do item-by-item analyses to make fair use decisions. But what exactly should the process for those decisions look like?

As Brandon Butler from American University [has pointed out](#), the decision-making processes will be different when we are assessing uses for teaching that are transformative versus those, like e-reserves, that are not. We still have a good deal of freedom when the use is transformative — when the original material becomes part of a new expression, a new meaning, or a new purpose. And this is important for a great deal of scholarship and teaching. We should not lose sight of this important application of fair use, or assume, incorrectly, that the 11th Circuit ruling creates new limits on transformative fair use.

But when we must make decisions about digital course readings, we need to apply the “old-fashioned” four factor test. What does it look like after the Appeals Court ruling? I am afraid it has gotten pretty muddy:

The first fair use factor — the purpose and character of the use — continues to favor fair use whenever that use is undertaken by a non-profit educational institution. If a commercial intermediary is involved, as was the situation in the course pack cases, this is no longer true. But where there is no profit being made and the user is the educational institution itself, the first factor supports a claim of fair use. And that is where the clarity ends.

The second factor — the nature of the original — can go either way, depending on the specifics of the work involved. Is it more factual or interpretive? This is a judgment call, and one which librarians may be hard-pressed to make when processing a number of e-reserve requests in a discipline they are unfamiliar with. The good news is that the Court said that this factor is relatively unimportant, so the safest course may be to consider this factor neutral; call it a draw — at least where the item is not clearly creative — and move on.

On the third factor we thought we had a rule, even if many of us didn't like it — 10% or one chapter was the amount that Judge Evans said was “decidedly small” and therefore OK for fair use for digital course readings. The bad news is that we no longer have that rule. The good news is that we no longer have that rule. The 11th Circuit panel wanted a more nuanced approach, that balances amount with the other factors and especially looks at how appropriate the amount used is in relation to the educational

purpose. When the other factors line up in favor of fair use, this approach could well allow more than 10%. If the other factors tend to disfavor fair use, only a much shorter portion might be permissible. It is just very hard, after this ruling, to have clear standards about the amount that is usable, and that makes things difficult for day-to-day decisions.

With the fourth factor — impact on the market for the original — the 11th Circuit made things even more unclear. The panel actually affirmed the lower court in its analysis of this factor, emphasizing that it is permissible to take into account the availability of a license for the specific use as part of evaluating this factor. So if a license for a digital excerpt is unavailable, does that mean this factor favors fair use, as Judge Evans said? Maybe, but the 11th Circuit added two complications. First, it said that the Judge should have included the importance of license income to the value of the work in her fourth factor reasoning, rather than treating it as an additional consideration for breaking “ties.” Second, they said that the fourth factor should have more weight in non-transformational settings. How are we to put these instructions into practice? Libraries do not have access to publishers’ accounts, as the judge did, so we cannot assess the importance of licensing income (nor can we trust publishers to give us straight answers about that importance). And what does more weight mean? If there is no digital license available, does more weight on this factor mean more room for fair use, perhaps of a larger excerpt? Again, maybe. But it also seems to mean that where such a license is available, even 10% or one chapter might be too much for fair use.

How does one swim in water that is this muddy? The answer, of course, is very carefully. We must keep on making those decisions, and we do have space to do so. The fair use checklist, by the way, received a relatively sympathetic description from the 11th Circuit, but not a definite embrace. At this point, my best advice is to keep on doing what we have been doing, thinking carefully about each situation and making a responsible decision. I would recommend a somewhat more conservative approach, perhaps, than I might have done three weeks ago, especially when a license for a digital excerpt is available. But the bottom line is that the situation is not much different than we have always known it to be, there is just a little more mud in the water.

# Free speech, fair use, and affirmative defenses

*Mon, 03 Nov 2014 07:22:59, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

On an e-mail list to which I do not subscribe, there was recently a long exchange about fair use and large-scale digitization. Part of the exchange was forwarded to me by a friend seeking comment about a specific issue that was raised, but in the course of looking back at the thread I discovered this comment: Fair use doesn't "allow" large scale digitization and didn't "allow" digitization in the case of HathiTrust. The fair use provision does not allow anything up front- it has to be won through litigation. The fair use provision was used as an affirmative defense in litigation concerning the HathiTrust et al., and after much time and money spent in litigation, the court ruled, and the appeals court ruled, that HathiTrusts' activity could be considered fair.

This comment repeats a mistake that is very common in discussions of fair use — while noting correctly that fair use is an "affirmative defense," it concludes from that fact that fair use must be something unusual, a privilege that we rely on rarely because it is risky and difficult to prove. But, as I hope to show with the rest of this post, affirmative defenses are quite common; in fact, almost all positive rights have to be treated as affirmative defenses in litigation. We rely on things that are "allowed" by affirmative defenses all the time.

Basically, to call something an affirmative defense is to make a technical point about how it functions in a court case. We should not be frightened by the phrase or invest it with too much significance. Some of our most cherished rights would have to be called affirmative defenses in the technical sense that is the only proper usage of that phrase.

Consider the case of *Cohen v. California* (1971), one of our most important cases about the meaning of the First Amendment. Mr. Cohen entered the Sacramento court house wearing a piece of clothing on which he had written a profane anti-war message — "F\*\*K the Draft" — and was arrested for disturbing the peace because that message was considered "offensive conduct." The Supreme Court ultimately held that it was protected speech, in spite of the profanity, and that Cohen's arrest was therefore improper. But let's imagine for a moment how the trial over this issue must proceed. The state would provide evidence that Cohen did wear the jacket, had deliberately painted the words on it, and knew what was written on his jacket when he entered the court house. Cohen's defense would then be to actually admit all of those points, but raise an additional fact — his words were political speech protected by the First Amendment to the U.S. Constitution. Free speech would thus function as an affirmative defense to vindicate Mr. Cohen's right.

I hope this example illustrates two things. First, all an affirmative defense means is that the defendant must raise additional facts or legal principles in addition to what the plaintiff or prosecution has asserted. This is not uncommon; anytime a defendant does more than simply deny the truth of everything the plaintiff says, they are raising an affirmative defense. Second, all of our most cherished rights in America can function as affirmative defenses in court, but that does not mean they are unusual or unreliable.

In any court case, the plaintiff has to prove some facts in order to establish that a "cause of action" exists. A defendant then has two avenues — he can simply deny the truth of some or all of what the

plaintiff has said (we call that arguing that the plaintiff failed to meet her “burden of proof”) or he can produce additional facts that show that what he is accused of doing is actually permissible (which is the defendant’s “burden of proof”). If we take the Georgia State copyright case as an example, we can see both strategies at work. For over 20 of the challenged excerpts, GSU successfully argued that the publishers had not met their burden of proof by showing that they owned a valid copyright in the works in question. Since the publishers could not produce valid transfers of copyright, there was no further need for a defense. For 40+ other excerpts, however, GSU successfully argued some additional facts and showed that their use was fair use (although the Appeals Court has now told the trial court to reanalyze this). Just like Mr. Cohen in the free speech case, GSU invoked a positive right that is precious to all Americans, but in the context of the lawsuit that right was presented as an affirmative defense.

I can’t say it often enough — when one is sued for doing something one believes is actually allowed by the law, that “right,” whether it is free speech or fair use, is always presented in the form of an affirmative defense. All that means is that it is something which the defendant must raise to justify herself (something for which she bears the burden of proof), but these things are not rare, disreputable or frightening; they are the very rights that define our citizenship.

Fair use is one such right, and the copyright law very clearly calls it a right (in section 108(f)(4) of Title 17). It is a key and indispensable component of our system of copyright, as the Supreme Court has reminded us many times (E.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) at 575). It is, especially, a “safety valve” that protects free speech from encroachment by copyright holders, and it is useful to think of those two rights — free speech and fair use — together.

So it is simply wrong to say that fair use does not “allow” anything because it is an affirmative defense, just as it would be wrong to say that about free speech. The First Amendment allows me to have campaign signs on my lawn during this election, even if my neighbors disagree strongly with me. It allows me to carry a placard down a public sidewalk proclaiming that “The End is Near,” if I am so inclined. It would allow me even to wear a swastika tattoo, as offensive as that would be to many. In the same way, there are many activities that we can say with assurance are allowed by the right of fair use. When we use a quotation from a previous work in a new article we are writing, we do not stop to do an individualized analysis because we know, and pretty much everyone agrees, that this is a settled instance of fair use. Nor do we need to re-litigate the *Sony v. Universal Pictures* case every time we want to record a TV show to watch at a later time; the Supreme Court has confirmed for us that doing this is allowed by fair use. And in the *HathiTrust* case, the Second Circuit told us that fair use supports large-scale digitization for the purpose of indexing and access for persons with disabilities. It is possible that a rights holder could challenge such an activity again, just as some government entity could again try to outlaw profanity in political speech. Possible, but unwise and very unlikely.

When we say something is an affirmative defense, all we are doing is indicating how it would be raised in litigation. Many of our most cherished freedoms would be raised as affirmative defenses. So we must resist the urge to allow ourselves to be frightened by that phrase or to accept arguments intended to make fair use seem odd, unusual, or risky. Fair use is no more unusual or dangerous than free speech is.



# Going all in on GSU

Thu, 13 Nov 2014 14:02:59, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]

On Friday the publishers who are suing Georgia State University for allegedly infringing copyright by scanning short excerpts from academic books to provide students with access through electronic reserves and learning management systems [filed a petition for a rehearing](#) by the entire Eleventh Circuit Court of Appeals. As most will recall, the panel of the Eleventh Circuit essentially did what the publishers wanted — reversal of the lower court judgment — but the appeals panel denied those plaintiffs most of the principles by which they hope to radically reshape copyright law. The publishers clearly understand that, whatever they can gain from additional lower court proceedings on remand, they will not get what they wanted when they brought the lawsuit. The panel ruled that the first fair use factor favors an educational, non-profit use even if the use is not transformative, that an item-by-item analysis is appropriate, and that it matters in the fair use analysis whether or not a license for digital excerpts is available. The publishers have decided they cannot live with these conclusions, so they have asked that those specific issues be reconsidered by the entire Eleventh Circuit court. Their “petition for en banc rehearing” lays out their arguments.

GSU [also has filed a petition for rehearing](#). They are seeking some corrections to inaccurate statements about what list of alleged infringements was considered by the lower court, as well as a ruling that the risk of market harm from electronic reserves is a question of fact that the lower court should be instructed to consider. That risk, GSU argues, should be proved; it is not something the appeals panel should have presumed.

It is important to understand there is little chance that these petitions will be granted. When a case is appealed from the lower court to a Circuit Court of Appeals, we call that an “appeal as of right.” That is, that first appeal must be heard by an appellate panel. But thereafter, all subsequent appeals are discretionary; the court does not have to actually take the case, it has the option to deny the petition. Most people are familiar with the idea that the Supreme Court actually reviews only a tiny percentage of the cases for which it receives a petition for a hearing. Besides asking for Supreme Court review, the other option, [after losing \(or feeling like you lost\) an appeal in front of a Circuit panel](#), is to ask that the entire group of judges in that Circuit reconsider the case. Like Supreme Court petitions, these petitions for en banc rehearing are rarely granted. In fact, the Federal Rules of Civil Procedure explicitly say that petitions for rehearing are “not favored and ordinarily will not be granted” (FRCP 35(a)). For more information about these post-appeal options, interested readers should see [this article from the law firm Reed Smith](#).

So does the petition from the publishers stand a chance? There are two reasons a petition for rehearing might be granted: when there is a split within the courts of the Circuit or when a “question of extraordinary importance” is involved. In their petition, the publishers rely on the latter claim, but it is not very convincing. They try to drum up controversy by suggesting that the panel ruling contradicts some Supreme Court precedents, but, again, the effort is weak. The petition relies on the 1980’s decision in *Harper and Row v. Nation Magazine*, which the Supremes themselves have seriously modified in later rulings. So when the publishers object that the panel ignored *Harper’s* emphasis on the importance of the fourth factor, they are deliberately ignoring language from the later *Campbell v. Acuff-Rose* case.

The other source that the publisher petition puts a lot of weight on is the “special concurrence” by Judge Roger Vinson. Essentially, Judge Vinson dissented on every major point in the majority opinion, but concurred in the result. Taken together, the two opinions indicate that a lot of negotiation took place in the 11 months it took to produce the ruling. It suggests, in fact, that the other two panel judges — Tjoflat and Marcus — were actually more sympathetic to fair use than is expressed in the majority opinion. But what is important about the heavy reliance on Judge Vinson in the petition for rehearing is the fact that Judge Vinson is not a regular member of the Eleventh Circuit. He is a senior judge at the District Court level (in Florida) who was on the Appeals Court panel to fill a vacant seat (called “sitting by designation”). That means that he presumably will have no role in deciding whether or not to grant the petition, or in any actual rehearing, in the unlikely event the petition is granted. So the publishers have found a friend in Judge Vinson, but he is not a friend who can help them all that much.

This petition for rehearing is thus a long shot, and it reveals the stark opposition of these three publishers to fair use as it has traditionally been interpreted throughout the long history of U.S. copyright law. Let’s look at the three principles the publishers say that they want and that the appeals panel got wrong.

The first point from the panel decision that the publishers say is wrong involves the idea of “media-neutrality.” This is a huge red-herring that the publishers have been waving around to distract the various courts from the weakness of their case, and they lead off with it in the rehearing petition. Judge Vinson was convinced by this argument that if courts do not treat electronic reserves the same way print course packs were treated in the “copyshop” cases from the 1990s, they are violating a principle of media-neutrality. The majority opinion, on the other hand, tried to define the limited role that media neutrality has in copyright law, a definition the new petition claims was an error. There are a couple of important points that are getting overlooked in this discussion.

For one thing, there are many ways in which copyright is not media neutral. Many exceptions, for example, refer to specific media and specific technologies. There is a provision just related to royalties on digital audio recording machines, for example. The TEACH Act refers to transmission over a digital network, and is inapplicable to other types of distance learning. Broadcast television is treated differently than cable, and terrestrial radio differently than Internet radio. Since the law is therefore often media-specific, it was not irrational for the panel majority to try to define what media neutrality does, and does not, mean. The publishers want it to mean something very specific in order to benefit their case, but the panel looked at a principle-based definition that took account of how the copyright law as a whole really works, and rejected the publishers’ *ad hoc* claim.

The reason for pushing this broad and self-serving definition of media-neutrality, of course, is to convince courts that the “course pack” cases are good analogies for electronic reserves. Since those cases found against fair use, the publishers’ argument goes, the principle of media neutrality demands that fair use also be rejected for electronic reserves. But, in fact, neither the lower court nor the appellate panel has rejected the course pack cases because of a perceived difference between electronic and print fair use. This is just sand being thrown in the face of the courts to confuse them (it worked with Judge Vinson). The course pack cases are distinguishable instead on first factor grounds that have nothing to do with the media involved; those cases involved a commercial intermediary making and selling the course packs, which is an entirely different situation than is reflected in the GSU case.

The second claim the publishers make in their petition attempts to undermine the first fair use factor more directly by asserting that it should not favor non-profit educational uses unless they are transformative. Although the publishers assert that this is the meaning of the Supreme Court’s ruling in

*Campbell v. Acuff-Rose Music*, that is simply not true. Although that case laid great weight on transformation for many fair use decisions, it explicitly stated that not all fair use must be transformative, and cited “multiple copies for classroom use” as the paradigmatic case of a non-transformative use that is likely still fair. They get this phrase directly from section 107, of course. So the publishers are asking for a pretty radical reconfiguration of the copyright law here, that would directly defy the Supreme Court and the text of the law. It would be pretty audacious of the Eleventh Circuit to accept this argument, but the publishers are clearly going all in with their fight against fair use. It seems they are reasoning that if they can persuade the Eleventh Circuit into accepting this radical new view of copyright, they could at least get a shot at Supreme Court review by provoking a split in the circuits where none has previously existed.

Finally, the most troubling claim the publishers make is in their argument that the fourth fair use factor’s emphasis on market harm, including “potential” markets, gives them the right to decline to offer a license for digital excerpts without tipping the fourth factor toward favoring fair use. The appellate panel correctly noted that this argument would demolish fair use, since it would allow a rights holder to say “we could have licensed this use if we wanted to, so allowing fair use damages the potential market we have chosen not to enter.”

In one sense, I would like to see a discussion of this idea of potential markets. It should be seen as a gateway to consider the incentive purpose of copyright law. How would it create additional incentive for creation to permit publishers to refuse to license uses of academic works? These markets are not an end in themselves, but a vehicle to produce such incentives. Establishing a right to refuse to license does not serve this purpose at all. It is a selfish and antisocial argument put forward by the publishers to protect the artificial scarcity that they believe they must create in order to make money. In short, the publishers want the right to limit access to knowledge because they do not have the vision needed to run successful businesses in a changing environment.

What do we lose if that argument is accepted? Only our most cherished democratic value, the freedom of expression. Fair use has always been considered a “safety valve” for free expression that prevents a rights holder from suppressing speech he or she doesn’t like by asserting copyright. If we were to accept this potential market argument, a rights holder would be a step closer to preventing scholarly commentary by denying a license for the quotations used in, for example, a review (as Stephen James Joyce [famously tried to do regarding his grandfather’s work](#)). That might seem extremely unlikely on a larger scale, but we should remember that publishers often require their authors to obtain permission for the use of quotations beyond an artificially imposed word limit. Combined with this idea that denial of a license should not improve the fair use argument, the conditions for such suppression would be ideal.

The truly shocking thing about this petition is how openly Oxford University Press, Cambridge University Press and Sage Publishing are now attacking free speech and the dissemination of knowledge. These are not “academic” presses anymore; their profit motive and shorted-sighted focus on protecting old business models has led them to assume an anti-academic stance that the scholarly community should not tolerate. They are demanding nothing less than a right to suppress and inhibit the spread of knowledge, simply by refusing to offer a license, whenever they believe that doing so is to their commercial advantage. I have often been asked if I think scholars, libraries, and others should boycott these publishers because of the lawsuit, and I have always said that we should wait and see where the cases go. To me, it has now gone in an intolerable direction, one that threatens core principles of academic discourse. Everyone must make their own decision, of course, but I am now willing to say that I will neither publish with these three plaintiff publishers nor buy their products. They have declared war on teaching and the dissemination of scholarship, and I will not help them buy the ammunition.

# Public access and protectionism

Thu, 04 Dec 2014 13:01:36, ksmithl2@duke.edu, [category: digital-rights-management, category: open-access-and-institutional-repositories, category: scholarly-publishing]

By now many folks have commented on the [announcement from Nature Publishing Group](#) early this week about public access to all of its content and most have sussed out the fairly obvious fact that this is not open access, in spite of the [rah-rah headline in the Chronicle of Higher Education](#), nor even public access as it is defined by many national or funder mandates. Just to review quickly the major points about why this announcement actually gives the scholarly community so much less than is implied by either of those terms, consider these limitations:

1. A putative reader can only get to an article if they are sent a link by a subscriber, or the link is present in a news article written by one of the 100 news organizations that NPG has chosen to “honor.”
2. Articles can only be read inside NPG’s proprietary reader
3. No printing or downloading is possible, so a non-subscriber hoping to use one of these articles to further her own research better have a darn good memory!
4. No machine processing will be possible; no text or data mining.

In short, all of the inconveniences of print journals are preserved; what NPG is facilitating here is essentially a replica of loaning a colleague your copy of the printed magazine. Or, at best, the old-fashioned system whereby authors were given paper “off-prints” to send to colleagues. Although, honestly, off-prints had more utility for furthering research than this “now you see it, now you don’t” system has.

If this is not open or public access, what is it? I like the term “beggar access,” which [Ross Mounce applied to NPG’s scheme in a recent blog post](#), since it makes clear that any potential reader must ask for and receive the link from a subscriber. Some suggest that this is a small step forward, but I am not convinced. There is nothing public or open about this “ask a subscriber” model; all it really does is prevent scholars from downloading PDFs from their subscription access to NPG journals and emailing them to colleagues who lack a subscription. In short, it looks like another stage in the ongoing comedy of fear and incomprehension about the way digital scholarship works on the part of a major publisher. But Mounce’s post suggests that the move is more than that; he points out ways in which it may be designed to prop up digital business that *Nature* and its parent Macmillan have invested in — specifically ReadCube and AltMetric.com. The byzantine scheme announced by *Nature* will drive readers to ReadCube and will generate data for AltMetrics.com, helping ReadCube compete with, for example, Elsevier and their proprietary reading and sharing tool, Mendeley.

That is, this looks like another move in the efforts by the large commercial publishers to buy up and co-opt the potential of open access. On their lips, open access does not mean greater potential for research and the advancement of science; it means a new market to exploit. If administrators, researchers and librarians allow that to happen, they will have only themselves to blame.

My colleague Haley Walton, who recently attended [OpenCon 2014](#), told me about a [presentation made by Audrey Watters](#) that included the idea of “openwashing,” which Watters defines like this: *Openwashing: n., having an appearance of open-source and open-licensing for marketing purposes, while continuing proprietary practices.*

This is exactly what is happening in this announcement from NPG; old business models and awkward exploitation of new markets are being dressed up and presented as a commitment to access to scholarship, but the ruse is pretty transparent. It may quack like a duck, or be quacked about, but this plan is really a turkey.

If NPG really was committed to better access for scientific research, there is a simple step they could take — put an end to the six-month embargo they impose on author self-archiving. Much of their competition allows immediate self-archiving of an author’s final manuscript version of articles, but *Nature* does not. Instead, they require a six-month embargo on such distribution. So this new move does only very little to ameliorate the situation; the public still cannot see *Nature*-published research until it is old news.

Speaking of news, at Duke we have a relationship between the office of Scholarly Communications and that of News & Communications whereby we are notified of upcoming articles about research done at Duke. In many cases, we are able to work with authors to get a version of the article in question into our repository and provide an open link that can be included in the article when it is released, or added shortly after release. Our researchers find that putting such links in news stories leads to much better coverage of their discoveries and increased impact on their disciplines. We always do this in accordance with the specific journal policies — we do not want to place our authors in a difficult position — which means that we cannot include *Nature*-published articles in this program. To be frank, articles published in *Nature* remain highly valued by promotion and tenure committees, but relatively obscure in terms of their ability to advance science. NPG seems to understand this problem, which is why they have selected a small number of news outlets to be allowed to use these tightly-restricted, read-only links. They want to avoid increasing irrelevance, but they cannot quite bring themselves to take the necessary risk. The best way they could advance science would be to eliminate the six-month embargo.

It is interesting to consider what might happen if *Nature* embraced a more comprehensive opportunity to learn what researchers think about open access by tying their “get a link from a subscriber” offer with an announcement that they were lifting the six-month embargo on self-archiving. That would demonstrate a real commitment to better access for science, and it would set up a nice experiment. Is the “version of record” really as important to researchers as some claim? Important enough to tolerate the straightjacket created by NPG’s proprietary links? Or will researchers and authors prefer self-archiving, even though an earlier version of the article must be used? This is not an obvious choice, and NPG might actually win its point, if it were willing to try; they might discover that their scheme is more attractive to authors than self-archiving. NPG would have little to lose if they did this, and they would gain much more credit for facilitating real openness. But the only way to know what the real preference among academic authors is would be for Nature Publishing to drop its embargo requirement and let authors choose. When they make that announcement, I will believe that their commitment to finding new ways to promote research and learning is real.

# Cancelling Wiley?

*Tue, 16 Dec 2014 10:28:33, ksmithl2@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Because they were spaced almost a full year apart, I really did not connect the dots when two Canadian universities announced that they were cancelling their “Big Deals” with John Wiley & Sons publisher. The Times Higher Education [reported on the decision at the University of Montreal](#) back in January 2014, while the [announcement made by Brock University](#) came only a few weeks ago. I would not have considered this a trend worth commenting on had it not been for conversations I had last week at the Fall CNI Membership meeting. During that meeting, two different deans of large university libraries told me, unbidden and in separate conversations, that they were also considering ending their deal with Wiley. I was struck by the coincidence, which caused me to remember these two announcements from Canada and to begin to ponder the situation.

Two different questions occurred to me when I thought about these four significant cancellations or potential cancellations, all directed at a single publisher. First, why was Wiley the focus of this dissatisfaction? Second, what is the next step?

As for what the complaints are about Wiley, the answer is pretty much what it always is — money. The THE article and the Brock University report both tell us that exchange rates have made the annual “higher than the inflation rate” price increases for these packages even harder to bear than usual. They also point to another problem. Pricing is based on the large number of titles included in these package deals, but many of those titles are not very useful. The Brock post notes that the Wiley package has a significantly higher cost per use than does their Elsevier package, which presumably reflects the fact that many of the titles the University is paying for in the package simply do not get used. The same reality is probably behind the fact noted by THE that Montreal would subscribe to less than 25% of the titles that had been included in the package it was cancelling. It would be interesting to find out, a year on, how much those other titles have been missed.

In my conversations with the two library deans, much the same thing was said about Wiley — demanding a large price increase, being inflexible in negotiation, and selling “a lot of junk that I don’t need” in the package. Libraries are beginning to discover that they do not need to put up with those tactics. Publishers often tell us that they are publishing so many more articles, which justifies their price increases, and they tell us how selective their flagship journals are. But when we look at these big deals, it is clear that selectivity is not an across-the-board approach; many articles that are not very useful just slide down the hierarchy to get published in journals whose main purpose is to pad out a “big” deal.

To me the more important question is “what now?” Unfortunately, many times when a library makes this kind of decision there is actually little money saved, since the funds simply go into re-subscribing to a smaller, selected list of titles from the same publisher. But presumably some of these cancellations result in dollars saved. And when they don’t, I propose that libraries ought to reexamine their approach. When you have cancelled a dross-laden package, think twice before reinvesting all of that money in as many individual subscriptions from the same publisher as possible; make a careful decision about where the division between useful titles and unnecessary ones really lies. Because here is the thing — money that can be saved and reinvested in open access projects will give us a higher return on our investment, because those projects will provide greater access.

It seems clear that, over time, libraries will need to move more and more of their spending away from the consumption side of scholarly production and do much more to support the creation and dissemination of knowledge directly. Commercial publishers hope to capture those dollars as well, but one of the real benefits of supporting open access can and should be more freedom from businesses addicted to 30% profits. I would like to challenge libraries to consider, when they have to cancel, using the money to support non-profit or lower profit open access projects. Work with a society to provide subvention for a scholarly journal to become OA. Work with your university press to support OA monographs. Finally, even if not compelled by immediate budget realities, think about making some strategic cancellations in order to take these kinds of steps. We know that open access is our future, and it is vital that we take control of that future before others take it from us.

I don't know if Wiley is the worst offender amongst the large commercial publishers, or whether there is a real trend toward cancelling Wiley packages. But I know the future of scholarship lies elsewhere than with these large legacy corporations. The process of weaning ourselves from them will be slow and drawn-out. But especially when the cancellations are going to happen anyway, we should have the idea of using the funds to advance the transition to open access foremost in our minds.

For a similar, but likely better informed, perspective on the idea of cutting subscriptions to support open access, please read Cameron Neylon's post on "[Letting it go — Cancelling subscriptions, funding transitions](#)," which ties the idea in his title to the discussion going on in the Netherlands about Elsevier's big deal.



# Getting into print the hard way

*Mon, 22 Dec 2014 07:30:49, ksmithl2@duke.edu, [category: libraries, category: scholarly-publishing]*

I hope I will be forgiven some self-promotion if I point out that my first book (that's a little like saying my "first" marriage — so far it is the only one, and no other is anticipated, but one should never say never) has just been published. It is a handbook of intellectual property designed specifically to address the needs and concerns of researchers and teachers, and it was published on December 10 by the Association of College and Research Libraries. It is available for purchase on the [ALA Store site here](#). There is also a PDF made available under a Creative Commons Attribution/Non-commercial license [on the ACRL site](#). I also expect to have a PDF in the DukeSpace institutional repository soon.

As a last piece of book promotion, I will note the [blog post about the book](#) on the Author's Alliance web site, which was largely written by me.

All that aside, the real purpose of this post is to tell the story of publishing this book, because I think it is instructive for thinking about scholarly communication today. If I had to start with a moral for the whole story, it is that I should have started with the librarians, because they are a group — the ACRL was wonderful to work with — that can publish in the way most consistent with academic values and needs.

The story begins when I was contacted in 2009 by an editor for the University of Chicago Press, who suggested that I should write a handbook on IP for scholars. I was immediately interested, and, at the editor's request, wrote first a proposal and then drafts of the first two chapters. Those chapters were sent out for review and we received both helpful suggestions and a recommendation to continue to develop the book from three reviewers. With that step complete, the U of C Press and I signed a contract in late 2010, and I set out on a long and difficult journey to finish and publish the book.

The writing process took me considerably longer than I expected; no surprise there, of course. When I apologized to my editor I was assured that it was OK; they would be interested in the project, they said, whenever it was complete. During this time, however, I got the first indications that this would not be a smooth relationship. I sent in chapters as I finished them, as the editor encouraged me to do, but did not get any of the promised feedback as I progressed. For a couple of years I was essentially writing in a vacuum.

I finished writing in March 2013 and, in May of that year, finally sent the Press the completed draft of the manuscript, which they sent out for review. The Press' policy is that they must have two reviews of the full manuscript that recommend publication before they refer the book to their board for a final thumbs up. So I began to wait. After six months I checked in and was told that the Press had sent the manuscript to three reviewers. One had sent in a report with a recommendation to publish. One had reviewed just two chapters of the book, asserting that they were only qualified to comment on a portion of the subject matter. The editor had not yet heard from the third reviewer, and without two full review that recommended publication, they could not move ahead. The editor told me that the third reviewer would be reminded and that the Press would also look for an alternate reader.

Five months after this, having still heard nothing, I inquired again. My e-mail went unanswered. A second e-mail did elicit a response, which was that they were still waiting for that third reviewer. There was no sign they had ever sought that additional reader.



At this point I was pretty frustrated. Five people had read at least part of the manuscript, and all had recommended publication. All of them had also made really helpful suggestions for improving the text which I tried to adopt. But the U. of C. Press was still passively waiting for that one final reader so they could comply to the letter with their self-created rules. What bothered me most was the apparent lack of effort and commitment I was getting from the Press. After talking with several academic authors about my situation, I decided to withdraw the book from the U of C Press.

When I told my editor about this decision, the first reaction was to try to talk me out of it and ask me to have patience. The second reaction was to remind me of our contract and to suggest that I had no alternative but to wait it out with the U. of C. In response, I suggested two concessions from them that would make the waiting easier. First, I asked (for the first time, I am embarrassed to admit) for some form of open access to a version or a part of the book. Second, I asked to be paid half of the advance we had agreed on as a sign of the Press' commitment to the project. I was told, however, that the first request was impossible because they needed to protect potential sales for the book, and that the second was contrary to their policy. In regard to the latter issue, I was pointed to specific language in my contract about when the advance would be paid. So I looked. It turns out that the contract language was actually different from what the editor told me it was. It stated pretty clearly that I would be paid the advance when I sent in the manuscript, not, as I had been told, only when and if the board approved final publication. I have no idea why the contract language was what it was, or if it was really different from what the editor thought it should be. I had not changed or negotiated that part of the agreement back when it was signed. Maybe the Press just figured that no one will read their contracts, so they could claim whatever they wanted about them.

Anyway, I brought this discrepancy to the attention of my editor. That was the last contact I ever had with that person. A few days later I got an e-mail from the Director of the Press, apologizing to me for the treatment I had received and confirming that the Press had breached our contract by not paying the advance in a timely fashion. I was told that I would be released from the contract AND that the Press would still pay the advance I was owed. Over the next few weeks, we signed a formal letter releasing me to publish the book elsewhere and I received a check for the long-delayed advance.

On the plus side of this relationship, I did get quite a lot of very helpful feedback for my manuscript from the readers (although, of course, I am solely responsible for whatever errors remain). Also, when faced with the clear evidence that they had not lived up to their side of the bargain, the Press did the right thing (maybe just to get rid of me!). But on the negative side, I got almost no help from the editor in actually developing the manuscript, the "management" of peer-review was lackadaisical, and I wasted over a year after the book was finished waiting for the Press to get its act together before I asserted my freedom to start looking for another publisher.

After this experience, I spoke to one other commercial publisher, and this time made the expectation of an open access copy a condition from the beginning. That led to a very short conversation. So finally I did what I should have done from the start — work with the ACRL. That experience was smooth, collaborative, and focused on the best way to make my work serve the needs of the audience it was intended for. The ACRL arranged for excellent and expeditious copy-editing and indexing. They agreed to immediate open access for the entire book. When there was a problem with the first print run of the book, the ACRL took immediate responsibility and re-printed the whole run. The process took less than six months from signing a contract to publication.

From this experience I take away three lessons, which I think are worth sharing. First, the claims about how much effort publishers put into a new book, and the help they provide to authors, are at least

sometimes exaggerated. I was working with a prestigious university press on a book they had solicited in the first place, and yet did not get nearly the kind of assistance or interest that I sometimes hear promised. Second, it is extremely important to read, negotiate and save a copy of the publication contract. That my book is now in print is largely due, I believe, to the fact that I could go back to the actual language of our agreement in order to convince the U. of C. to release me to find another publisher. And finally, as I said at the beginning, libraries and library organizations, in my experience, understand the needs and goals of scholarly authors better than commercial presses. As the future of academic publishing unfolds, I strongly hope that more and more of it will be in the hands, or under the oversight, of libraries.

# Does copyright provide shade against Sunshine laws?

*Fri, 02 Jan 2015 14:04:23, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]*

There are many situations in which the application of fair use is vitally important. Educational uses are paramount, of course, and the law of fair use was clearly written with them in mind. But right up at the top of the list, along with education, should be protecting free speech and supporting governmental transparency. This last value, however, has been put in some doubt by a decision back in August by the Missouri Court of Appeals. The question, which has arisen in several recent court cases, is whether copyright can be used by a state university to avoid releasing materials that have been requested under the state's freedom of information, or "Sunshine" laws as they are often called. The laws are intended to shine light on the workings of government, and these situations where copyright is asserted to prevent the release of records threaten a novel method by which government agencies can avoid public scrutiny.

The cases have been brought by an organization called the National Council on Teacher Quality, or NCTQ, which advocates for tougher evaluation standards for teachers and is sharply critical of many teacher education programs. The NCTQ has sent requests under numerous state Sunshine laws asking for the syllabi used in various teacher education courses at state universities, and that is where the copyright cases have arisen. In at least two states the university and/or a teachers union has sought to prevent the release of the requested syllabi by asserting that such documents are the copyrighted property of individual faculty members and that the Sunshine laws do not permit the state to release material when doing so might infringe copyright.

I am coming at this issue slightly backwards, because I was alerted to it by a [report in the Chronicle of Higher Education](#) when, earlier this month, the Missouri Supreme Court upheld a decision refusing to release the syllabi because they were protected by copyright. That [decision, handed down in August by the Missouri Court of Appeals](#), was something of a shock to me; the reasoning is so bizarre and it seems to try so hard to misconstrue the arguments made by the NCTQ that I can only conclude it is result-driven. That is, the court decided what it wanted to do and then contorted the law to achieve that outcome. I want to walk through some of the oddities of this decision, then look briefly at a case from Minnesota, decided a year earlier, in August 2013, and pointed out to the Missouri court, that got the situation right, in my opinion, recognizing that fair use can prevent state entities from using copyright to shield themselves from sunshine laws.

Those other cases provide the first illustration of the oddity of the Missouri decision. The Court of Appeals was presented with several previous cases from other states where copyright was held not to prevent release of materials that were otherwise subject to Sunshine laws. But the Missouri panel declined to acknowledge those precedents — they were not obligated to do so, to be sure — by arguing that those rulings had never found that copyright "had no application" in such cases. But that is not what the NCTQ had argued; they offered the precedents to show that copyright had not, in the past, been permitted to shield the government from disclosure. The Missouri Court of Appeals misconstrued the point and then, based on this misunderstanding, dismissed the cases and did exactly what it had been warned against — turned copyright into a defense against open government.

Later on in the decision there is another instance where the court again appears to willful misunderstand the NCTQ's arguments in order to get to its desired goal. When the NCTQ argues that syllabi are widely distributed already, the Court of Appeals claims that this is an argument based on privacy concerns and, as such, inapplicable to a case about copyright. But it is clear that the NCTQ is arguing a copyright point related to the "market" for syllabi and the potential for harm (minimal) that would result from handing them over for NCTQ research purposes. In short, this is part of a fair use argument, to which I will return below.

But first we should note one more oddity in the Missouri case, which is not the fault of the Court — the fact that the copyright ownership of the syllabi was never disputed. Apparently both sides conceded that the faculty members were the copyright holders. It might have been a better strategy for the NCTQ to raise the issue of work made for hire here and try to claim that the University, an arm of the state, was the copyright holder and therefore not entitled to use its own copyright to impede disclosure under the law. Apparently the mutual concession on this point was based on the policy at the University of Missouri which said that faculty held their own copyrights, but this policy could easily be challenged (as most such university policies could) on the grounds that they do not meet the standard of "a written instrument signed by [the parties]," which is what the copyright law requires to return a work made for hire to individual ownership.

So here we have a situation where syllabi are widely distributed but, when requested by a private organization with an undeniably political agenda, are held to be the copyrighted property of individual faculty members and therefore excluded from Sunshine law disclosure because they are "protected from disclosure by law." This is clearly a ruling that effectively destroys the Sunshine law in Missouri, since most everything requested under it will be the copyright-protected property of someone. Maybe in a later ruling the courts could make it clear that copyrights held by the state itself do not justify withholding materials from disclosure, but this case does not say that. And even if that is the state of the law in Missouri, this ruling provides a huge loophole in the Sunshine law that clever agencies will surely find multiple ways to exploit. Such a situation cries out for a comprehensive fair use analysis, and yet the Missouri Court of Appeals declines to undertake one.

Three reasons are advanced by the Court to explain why fair use is unavailing to protect the Sunshine Law from being gutted by copyright claims; all are unavailing, in my opinion:

1. First, the Court of Appeals claims that, as a state court, it "lacks authority" to consider the effect of the Federal copyright. This is clearly nonsense. State courts regularly consider questions of Federal law when necessary to resolve an underlying state law issue. The Minnesota case that was pointed out to the Court of Appeals is exactly such an example, which the Missouri panel chose to ignore. It should be obvious that when the Sunshine exception refers to prohibitions by law, that necessarily means that the state courts will have to deal with Federal laws, and, in fact, the state court here does consider the impact of Federal copyright law. It just draws up short at the idea of considering fair use.
2. The Missouri Court of Appeals also asserts that it cannot consider fair use because there is no case of actual infringement before it, and fair use is an affirmative defense that is raised only after a *prima facie* case has been presented. This is a silly excuse in the context. For one thing, the law clearly tells us that fair use is a right, which, [like most rights, functions as an affirmative defense](#) in many situations. But even more fundamentally, the Court of Appeals is agreeing to the claim that the University of Missouri does not have to disclose syllabi because doing so

would involve it in potential copyright infringement; how is it possible to then decline to consider the applicability of a potential defense to copyright infringement as part of its analysis?

3. The Missouri Court of Appeals gets involved in a convoluted consideration of who would be able to assert fair use in this situation, and appears to throw up its hands in despair. On the one hand, the Court asserts that it cannot consider fair use because it does not know what the use is that NCTQ will make of the syllabi that might be turned over to it. But, on the other hand, the Court accepts the University's argument that it is not trying to enforce faculty member's copyright — which it would not have standing to do — but is merely protecting itself from committing infringement. So why is fair use not applicable to the *University's* use, an argument the Court rejects without much clear reasoning?

The Missouri decision is, in my opinion, one of the worst considered decisions I have ever seen; a colleague told me that even after being warned about it, it caused her to gasp in surprise and, I suspect, horror. The ruling is made that much worse because the Court had before it an example of how the situation should have been handled, in the case of [NCTQ v. Minnesota State Colleges and Universities](#), which was decided a year earlier and which got all of the issues raised above right where Missouri struggled to find a way to get them wrong. There is a [report on the Minnesota case available here](#). Quite simply, the Minnesota Court of Appeals found that it could, and indeed must, consider fair use when faced with exactly the situation that the Missouri court got so wrong. In Minnesota they decided that fair use clearly applied to allow a state institution to make and distribute the the copies needed to comply with the Sunshine law. It further held that the University could not resist compliance with the State's open-records law based on a speculative future infringement that might occur when the materials were in the hands of the NCTQ. In short, Minnesota decline to make copyright into an expansive shield that undermines the key values expressed in open records laws, which is exactly what Missouri did allow.

Fair use exists to prevent the copyright monopoly from undermining key democratic values. It supports education and free speech precisely because these are key components of a democratic system. So is transparency in government, and the deeply unfortunate decision made by the Missouri Court of Appeals allows copyright to defeat the intent of the Missouri Sunshine law precisely because it does not recognize that this is a key place where fair use should do its important work.

# After another defeat, what will GSU publishers do in 2015?

*Mon, 05 Jan 2015 08:13:52, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

Back in October the 11th Circuit Court of Appeals [issued its ruling](#) in the Georgia State copyright infringement suit brought by three publishers and the Copyright Clearance Center to try to end reliance on fair use for course readings that are digitized and made available to students in a closed online forum. As has been widely reported, that decision looked like a win for publishers, in that it vacated the lower court decision that largely favored Georgia State University, and it remanded the case back to the District Court for further proceedings. But what looked like a win was very dissatisfying to the publisher plaintiffs — Cambridge University Press, Oxford University Press and Sage Publishing. In the course of the opinion, all of the [radical changes to copyright law that they hoped to advance with the lawsuit](#) — the imposition of the 1976 Classroom Copying guidelines as a maximum limit rather than a safe harbor, the idea that the copy shop cases involving commercial course packs were appropriate precedents for in-house electronic reserves, a move from analysis of individual claims of fair use to a comprehensive impact analysis, and a statement that non-profit educational use did not necessarily favor fair use — were rejected by the Court of Appeals.

The publishers were very unhappy with this decision, even though it gave them the outcome they desired in the specific conflict. They are looking for a radical realignment of fair use; the actual case is relatively unimportant, I think, compared to this desire to change the landscape so that many more licenses for educational institutions would be required. So they asked the entire 11th Circuit to rehear the case (en banc) instead of letting the decision of the usual three judge panel stand. Their [petition for rehearing is a wish list of the principles](#) they would like to have govern copyright in academia, which, of course, all point to paying those publishers more money.

On Friday the 11th Circuit rejected this petition for an en banc rehearing, as well as the petition for rehearing filed by GSU. The Court did not comment on the rejection; they simply denied both petitions, thus leaving the opinion of the Appellate panel as the Court's final word on the case.

For libraries, this means we are still in the [uncertain and murky position I describe back in October](#).

For the publishers, there are a dwindling number of options left for them:

1. They can petition the Supreme Court to hear the case. This is really the only option that is available if the plaintiff publishers still want to fight for the ridiculous arguments they have been championing throughout the six and a half years of this lawsuit, so I will not be surprised if they do this. I am sure the lawyers representing the publishers are advocating for this; so is the Copyright Clearance Center, in all likelihood, and they are paying the bills. But the Supreme Court accepts only a tiny fraction of the cases they are asked to consider — the number is [less than 4% of cases](#) for which the petitioner has paid the usual filing fees (it is much lower for cases submitted where the plaintiff, usually a prisoner, claims that they cannot pay the costs). The cases the Supreme Court is most likely to accept are those where there is a split of opinions among the different Circuits of the Court of Appeals, and that is not the case with the GSU opinion. So this is a long shot for the publishers, but their only option now if they hope to save any of those principles that they have gone to war to establish.

2. They can seek the rehearing by the District Court that is the point of a remand from the Appeals Court. That hearing must be “consistent” with the analysis in the 11th Circuit ruling, so it is not likely to gain much for the publishers. The best they can hope for here would be a slightly tighter e-reserves policy at GSU that they could wave under the noses of other universities. But that would be a victory for them that would feel an awful lot like a loss.
3. Finally, they could settle the case. This would be the rational approach, but the plaintiff publishers (or those who are calling the shots for them) have shown little taste for reasonableness. They have poured a lot of money into fighting to undermine fair use for education, and settling now is probably less sensible, from their perspective, than it would have been months or years ago. And, to be honest, GSU has little to gain from a settlement at this point; they might just as well wait for further proceedings in the District Court. A settlement earlier in the case might have given the publishers a lever to use in negotiations with other institutions, but that opportunity faded when the 11th Circuit rejected all of those principles that the publishers were after. Now they have a much weaker hand.

Overall, I think we will see a petition for a Writ of Certiorari, which is what you file to ask the Supreme Court to consider your case. I doubt it will be granted, but I expect that 2015 will be a year of tilting at windmills for the publishers in this case.

# Who should we trust?

*Thu, 29 Jan 2015 09:05:33, ksmithl2@duke.edu, [category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

A recent discussion on an e-mail list, about university open access policies, raised the issue of trust. The participants correctly noted how important it is that there be some level of trust between faculty, administrators and the library (which is usually charged with managing an open access repository once a policy is in place) in order for an open access policy to be adopted and successfully implemented. Inevitably, the comments brought out the irony that faculty authors often seem very suspicious about administrator motives when debating an OA policy — fearing that someone is trying to “steal their stuff” — yet are perfectly willing to give that “stuff,” in its entirety and for no remuneration, to commercial publishers. And they do this even though it is obvious that commercial publishers do not share the fundamental values of academia about research and access.

When one looks a little deeper, it is easy to see, I think, that academic authors do not really trust the commercial publishers either; we hear lots of wry comments about how absurd the current system is, followed by a shoulder-shrug expressing resignation. It is absurd, but it is what we have got. “Trust” is probably the wrong word for what authors feel as they give away their work.

Perhaps it really is just resignation in the face of how things have been done for hundreds of years. There was a [fine column published recently in the Educause review](#) that encapsulates this scholarly stagnation with a story about a Buddhist monastery where the practice of tying up the monastery’s cat, begun because it disrupted the abbot’s lessons to novices, continued for centuries, through many successive abbots and cats, until it came to be invested with a false sense of significance. Mark Edington makes the case that we have become unreasonably wedded to a system that once had considerable utility for a set of circumstances that no longer exist, and are reluctant to embrace the changes needed for our new environment. There certainly is an element of “tying up the cat” in our continued dependence on commercial publishers and our willingness to pay them to do things that, in many cases, we can now do better and more economically ourselves. It is simply easier to do what we have always done, and to let the dissemination of scholarship remain in the hands of those who have done it for us for 300 years.

It is not that we exactly trust commercial publishers, nor do we exactly distrust them. We may recognize that the values and goals of the commercial publishing business are different from, and even in conflict with, the best interests of scholarly authors and of scholarship itself. Perfectly nice people, working to advance their own interests as best they can, come in to conflict as the conditions for research and teaching change. And a real ambivalence is created because of how interwoven the parts of the academic enterprise are. More than just inertia is a work; important aspects of the academic enterprise remain interlocked with traditional forms of publication.

Most obviously, the rewards system in higher education, which by definition has worked well for many of our most influential faculty, is highly entwined with traditional journal and monograph publishing. In the digital age, when we can actually learn so much more relevant information about the uses made of an individual scholarly article, it may be absurd to continue to look at impact factor and the “brand name” of the journal as evaluative measures, but the systems we have built around those factors are well entrenched. Change seems inevitable, but it will be slow. One of my major concerns is the cost of this snails’ pace, and the danger that “the usual suspects” will succeed in co-opting the new opportunities and convincing us to pay them for open access and alt-metrics, when we should look for



ways to save money and preserve more local control over these new, digital opportunities. An example of this danger can be found in the [“Open Access Roundtable”](#) sponsored by the Copyright Clearance Center that warned about the complexity of article processing charges. The CCC, of course, sees itself as a solution to that problem, while the role of universities is simply to pay others, through them, for the benefits of open access.

Late last year Jason Schmitt, a professor at a small liberal arts college, posted a column in the HuffPost called [“Academic Journals: The Most Profitable Obsolete Technology in History.”](#) He makes a good point. It seems odd that academia, which should be in the forefront of leading managed change, should be propping up a technology that has outlived its usefulness. We would laugh at people who continued to buy buggy whips well into the automobile era, yet we, as academics and librarians, are in danger of becoming those very laughing-stocks. Schmitt focuses on ideas for change laid out by [Sam Gershman](#) and John Bohannon and stresses the societal obligation we have to make the knowledge created in our colleges and universities more accessible.

Of course, trust is a key element in moving toward the open access future that Schmitt, like so many others, envisions. The systems we are moving toward will not be simple; it will involve multiple and diverse business models, and accommodation for lots of different needs. We will need to decide what parts of the scholarly communication system we can take over on our own campuses, where we should focus collective funding, and what elements might still be most reasonably “outsourced” to commercial firms. These decisions will be difficult, and different on each campus. At each stage we will need to decide who we trust; who are the right partners for this part of the journey.

The key to those trusted relationships, I think, is common values. As we move toward a more open future for scholarly communication, we need to focus on what are the best interests of scholarship and of individual scholars. The best way to overcome distrust between faculty and administrators, for example, is to ground the conversation on shared or complementary needs and goals — faculty want maximum attention and impact for their work, and administrators want to build and protect the reputation of the institution; open access, implemented thoughtfully, can bring those goals into alignment. Libraries, which are traditionally highly-trusted entities on campus, must keep their focus where, I hope, it has always been, on making teaching and research easier and better. In all of our conversation about changing the system of scholarly communications, we should keep that goal as our foundation. Even more importantly, we need to “walk the talk.” In our decisions about how we spend our money, especially, we should be guided by, and be seen to be guided by, those best interests of our scholars and our institutions. I firmly believe that those interests will lead us, by the shortest reasonable route, to our open future.

# Paying the bills

*Tue, 10 Feb 2015 07:20:04, ksmithl2@duke.edu, [category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Open access is not free. By saying that up front, I hope to confound some of the more extreme critics of the open access movement, who sometimes pretend that all OA supporters are dreamy-eyed and woolly-headed librarians who imagine that all information “wants” to be free. So I start from the premise that open access costs money, but I do immediately need to qualify that statement. By definition, open access does not charge the consumers of information any fee for access. It is free in that sense, but not in the sense that there are no costs involved in producing the works or making them freely available.

Of course, for most academic work, the majority of the “first copy” costs are already paid for outside the subscription system. Taxpayer money, research grants or private university funds support the research underlying scholarship, as well as the time of the authors who produce it. The work of reviewing and improving both articles and books is also borne by these sources, in large part. Commercial publishers, then, “free ride” on this investment, which is a sign of a failure in the market.

One truth that lies behind much of the open access movement is simply that there are more efficient ways to produce scholarship than the way it has been done in the past. Digital communications have brought down the cost of other types of content, but publishers continue to raise prices, arguing, improbably, that there are no significant savings in the transition from print to online distribution.

So here is a simple assertion — we must find ways to pay for open access to scholarship, but simply paying traditional commercial publishers to do it for us would just replicate a system whose failure in the online environment is all too obvious. Gold, or hybrid gold, open access is NOT a solution IF it is expected to simply replace subscription revenue and does not provide an opportunity for a more realistic assessment of costs.

There is a really nice article by Kevin Hawkins from the University of North Texas Libraries about “How We Pay for Publishing” in the latest issue of “Against the Grain.” I don’t think the issue is openly available, but there is a [pre-print of Kevin’s article in the UNT Digital Library here](#). The article is a concise overview of “how we got into this mess” and “how might we get out.” Kevin concisely summarizes the various proposals that would shift library investments from the consumption side of the research process — where we simply buy the products that are sold only to a limited set of buyers/subscribers — to the production side, where library funding helps support the creation of knowledge products that are available to all. As Hawkins points out, there is a potential free-rider problem here as well, and he writes about how different possible models can address it. When he turns to the impact of these models on university presses, he envisions a more mission-driven view of those organizations that would recognize that it is unrealistic to expect them to pay for themselves at the end of each fiscal year. Instead, we should look closely at costs and benefits, recognizing that increased access is a benefit, and support university presses as well as other organizations that are prepared to experiment with new models for more efficient production and broader access.

Costs, of course, are the elephant in the living room whenever improving access is under discussion. In a recent blog post [on open access books and double dipping](#), Martin Eve of the Open Library of the Humanities questions the claim that a particular publisher must recoup \$17,500 to make a single monograph OA. Martin’s concern is that the publisher in question may be “double-dipping” by

demanding the full-cost of the publication as an up-front OA charge and selling print copies as well. It seems that the OA charge could be reduced by the amount earned through print or e-book sales, just as journal subscription costs ought to come down as author's select "open choice" options. The fact that neither reduction is occurring, at least in a wide-spread way, is a sign that we need to ask much harder questions about the actual cost of production as we make this transition to supporting OA on the production side. The [study announced by Ithaka last month](#) should help us get a better handle on the true cost of publishing a monograph.

Those nations that use central funding to support open access publication — and there are a growing number of those — especially need to look at costs to be sure they are not wasting money. In this [guest post on the Digital Science blog](#), Jan Erik Frantsevag from Norway considers the path that would simply pay article processing charges (APCs) to commercial publishers in order to achieve open access, and lays out some concerns. Most especially, he explains why the Norwegian Research Council has decided that the funds offered to researchers to fulfill their open access mandate may not be spent on hybrid publications, where only certain articles are made open access after a fee is paid, while a subscription fee is still charged for access to the entire journal. Frantsevag cites three concerns that caused the Norwegian government to reject this hybrid model. First, because it double-dips, as described above. Second, because hybrid journal APCs are higher than those for other OA publications, raising precisely this issue of cost that we have been discussing. As more and more government funds are used to pay APCs, it seems likely that we will see more probing questions about cost being asked. Indeed, if U.S. universities are going to develop campus-based funds to support article process charges, we ought to be asking the same questions, and using caps on our funds to encourage more reasonable APCs. The third reason Frantsevag cites is simply that money for open access should support innovation and experimentation, not simply go to keeping the old business model afloat.

In each of these examples we see that efforts to encourage open access and find new models for supporting research must necessarily look at how much the production of knowledge products — monographs, journal articles, digital visualizations, etc. — actually costs. In the past these costs have been obscure to universities, hidden in the steady upward spiral of subscription expenses. But now we are seeing signs that the academic community is beginning to do what it probably should have done long ago — look closely at the actual costs and begin to evaluate the money we are willing to invest in each form of scholarly dissemination.

# The truth about contracts

*Fri, 13 Feb 2015 08:51:57, ksmithl2@duke.edu, [category: libraries, category: licensing, category: open-access-topics]*

The impetus behind this post is a specific discussion that took place on an e-mail list. The question under discussion was how to license student work for deposit in an institutional repository. At one point I said that a license could be created by a simple line in the syllabus for a course that said that certain designated works would be put in the repository, followed by the “performance” (used in contract law to refer to conduct related to the bargain) of handing in those works. This claim, which I thought was innocuous, was disputed.

The whole discussion reminded me that there are some serious misapprehensions about contracts, contract law, and licensing in the academic world. So rather than continue the debate on the list, I thought I would offer some basic truths about contracts and licenses in this space. That way my musings only clutter the in-boxes of those who subscribed, rather than everyone on the list. And the debate, if needed, can continue, because the comments will be open, as they are for all posts on this blog. I should add that what I say here is based on U.S. law, and mostly on the Uniform Commercial Code, which has been adopted into the commercial law governing contracts in every U.S. state.

So let’s start at the beginning. A contract is simply a promise that the law will enforce. The law does not enforce all promises, but a promise need not be very formal to be a binding contract. All that is needed is an offer, an acceptance of that offer, and some “consideration,” which simply means that each party must get something out of the bargain.

But there is more to say about contracts. One of the most important points is that contracts are business documents, intended to accomplish specific goals shared by the parties. Legal language is less important to a contract than a clear expression of the intent of the parties — what they want the contract to accomplish in their relationship. Lawyers are actually not the most important people in the drafting of a contract, the parties are, because they know what they want the contract to do. The cleanest or most formal legal language in the world is useless if it fails to express those intentions.

Perhaps because we so often deal with obscure and lengthy database licenses from vendors with lots of lawyers on staff, librarians tend to think of contracts as big, formal and very serious, even frightening, documents. But a contract can be very simple, and it need not even be a document. If my neighbor comes to my door and offers to cut my lawn for \$30, and I say OK, we have formed a contract at that moment. Note what the “consideration” is — a promise to cut my lawn and a promise to pay \$30. Promises are the most common type of consideration in a contract, but an offer for a contract can be accepted by performance. Suppose I asked my neighbor if he would cut my lawn for \$30 and he said nothing. But later that same day, he does cut my lawn. I owe him \$30 and the law would enforce the promise because my neighbor accepted my offer in a timely way by the act of cutting the lawn — there was an offer, acceptance by performance, and consideration on both sides; I got a neater lawn and he got my enforceable promise to pay \$30.

Another reason librarians might think that contracts are formal and serious is because they hear so often that contracts “trump” copyright law. Since copyright law is a very important federal law, contracts must be an even more serious matter to trump it. But, actually, we allow contracts to supersede copyright law not because they are so “big” but because they are small. U.S. Copyright law binds every person who is subject to its jurisdiction, but a contract binds only the parties who agree to

it. A contract is a “private law” arrangement by which two parties (or sometimes more) rearrange their own relationship. Within that relationship, we will allow parties to agree to give up various rights — under copyright, for example. They could even surrender their free speech rights in some limited cases. This is not because contracts are “stronger” but because they are “weaker” than other parts of the law — they only rearrange the rights of those who agree to them.

One way we can tell that contracts are “weaker” in this sense than the law that binds all citizens is that the risk associated with failing to fulfill a contractual promise is usually much lower than it is for a violation of public law. Contract damages are generally determined by the intended relationship expressed in the contract. In my example above, if I “breach” the contract by not paying my neighbor, the law could force me to give him “the benefit of the bargain,” which in that case was \$30. In most situations, that would be it; there are no statutory damages for contracts as there are in copyright law, for example, and the goal of contract “remedies” is usually either just to see that the parties get what they bargained for, or, at least, to put them back in the positions they were in before the contract was formed. As a lawyer, I would never advise someone to do something I believed was an infringement of copyright, but it is possible to imagine situations where breaching a contract could make sense; the classic example is where a business person can make a greater profit if they get out of the contractual relationship even if they have to pay damages. Such a situation is called an “efficient breach of contract.”

One final general point about contracts before we turn to licenses specifically. A contract is often “implied” by the way the parties behave. In my example above we saw that a contract could be formed when the person who received my offer simply acted on it; his acceptance was implied by performance. Only a very few contracts must be in writing, and they are specified by law. The copyright law tells us, for example, that transfers of copyright and exclusive licenses must be in writing (see section 210(d)), but non-exclusive licenses can certainly be implied. Most states require that sales of real property be in writing, through laws referred to as “Statute(s) of Fraud,” but it is quite clear that many other contracts can be oral, or even evidenced by some kind of action. “Shrink wrap” licenses for software are a good example, where opening and using the product is a sufficient indication that the purchaser has accepted the terms of use (see *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)).

In the copyright realm, implied licenses are actually quite common. A license, remember, is simply “a revocable permission to commit some act that would otherwise be unlawful” (from Black’s Law Dictionary). Note that a license is presumed to be revocable unless there is explicit agreement otherwise; for this reason, an implied license is always revocable. But, as I say, they are very common. The example we all rely on most, I dare say, is the [implied license created whenever someone puts a page up on the Web](#). When I look at that page, I am making an apparently unauthorized copy in the cache of my computer, which looks like an infringement. But courts around the world have recognized that it would be absurd to allow a webpage author to sue anyone who looked at the page for infringement, and have instead found an implied license in the act of uploading a page. There is an interesting [discussion of a case that tested the limits of an implied license here, on Forbes.com](#).

A license is not always a contract, but most are. In the case of an implied license to view a web page, one could argue that there is offer and acceptance, but it does not seem that there is consideration, something that each side gets out of the bargain. So it may be a non-contractual license, but it is a license all the same.

When we turn, *finally*, to the case of a syllabus that informs students that certain work they hand in will be made publicly accessible through an institutional repository, I think we can now see that all of the

elements of a license, and even a contractual license, are present. There is an offer made — in exchange for a grade and credit in this course, you will give the school a license for IR deposit. And when the work is handed in, there is a performance from which acceptance of that offer is readily implied. In this case, I also think there is consideration, since the student gets that grade and credit she bargained for (she could, of course, have rejected the offer by dropping the course, or she could even have counter-offered by asking for different terms), and the school gets a license. This is a valid contract that creates a license upon which the school can rely.

To say that the license is valid is not the same as saying it is wise to do this. It also ignores some other issues. A university might decide, for example, that putting work in a repository implicates privacy rights and therefore requires an explicit writing. But as a contract matter, the license is real and reliable. It is presumptively revocable, as explained above. So the situation might arise where the student decides she now longer wants her undergraduate essay on the web and requests that it be removed. In that situation I would first want to talk with the student and see if we could find an agreement that would leave the terms of the course assignment intact. If we could not reach such an agreement, I would suggest that the school should remove the work, because once the license is revoked the continued distribution could be an infringement of the student's copyright. But in that instance, the school is then entitled to consider whether the student has met the requirements for credit. If public distribution is considered a sufficiently important part of the pedagogy, the school could conclude that credit for the course should be revoked. This is simply acknowledging the mutual bargain that exists in all contracts.

As I argued on the list, this form of implied license is not legally different from many teaching strategies that implicate copyright. Suppose an art class tells students (either orally or in the syllabus) that their final projects will be included in a public departmental exhibition. Copyright is implicated, and a license is implied when the final project is handed in. The same would be true if a class assignment required students to create a web page, post a video to YouTube, or have a class discussion via Twitter. The point here is not to recommend or condemn any of these strategies, but merely to explicate the law that would support all of them.

The truth about contracts is that we deal with them every day. They need not be formal, and they need not intimidate us. They are simply the mechanism we use to arrange our relationships in a great many situations, including teaching situations that implicate the copyrights held by students.

# Where does FERPA fit?

*Mon, 23 Feb 2015 12:20:53, ksmithl2@duke.edu, [category: uncategorized]*

When I wrote my last blog post about contract law and the issue of licensing student work for public distribution, several people asked me about FERPA, the [Family Educational Rights and Privacy Act](#). Basically, the questions amounted to this: Don't we need to think about more than just the copyright licensing issue when we put student work in public, or when we require students to do their work in public? And the answer, of course, is "yes." That previous post was focused on the licensing question, and made only a passing reference to potential privacy issues. Here, I would like to look more closely at the issue of FERPA and student work in public, while acknowledging that I am not a FERPA expert.

The examples I gave about the types of assignments that might be made public, or might be done in public from the start, offer an interesting hierarchy regarding FERPA, I think. So I want to address them in three categories. First, things like theses, final papers and honors projects that an institution might want to put in its repository, then the issue of art exhibitions, and finally FERPA concerns when students work directly in a public forum.

The conversation started around the idea that a school might want to put final papers from a class, or perhaps capstone or honors papers, into its open access repository. I noted that, as a matter of copyright law, it was probably enough to inform the students of this intent in the syllabus, so that subsequently handing in the work form an implied license. I still think this is enough to deal with the issue of copyright, but it is not enough from the perspective of FERPA. Rather, FERPA requires a written, dated and signed waiver for educational records, such as these types of assignments, that are "in our keeping," to be made public. So for a final paper or project that is handed in to faculty and then released to the public through a repository, a document waiving FERPA in regard to that paper or project must be obtained. This written document could also serve as an explicit copyright license, but, as I say, it is necessary as a waiver of FERPA, while copyright can be licensed by implication.

The situation is more ambiguous when we ask about art projects that are handed in with the expectation that they will be part of a public exhibition. Once again, what I said about an implied copyright license for public display applies, but it seems like the FERPA waiver is also often implied. On the surface there seems to be no difference between the art project handed in for a grade and the final paper or honors thesis. We know we cannot put out a stack of papers and invite others, even other students, to look through them. Yet, with art exhibitions, schools seldom obtain FERPA waivers; they simply hang the works, which surely are also "educational records in our keeping," on the walls of a gallery and invite the public in to look. My friend Stephen McDonald, who is General Counsel for the Rhode Island School of Design and one of higher education's foremost authorities on FERPA, often speaks of an "implied pedagogical exception" to FERPA, and I think that construct might apply here. The Family Policy Compliance Office at the Department of Education, which oversees FERPA compliance, has said fairly often that FERPA is not intended to interfere with ordinary pedagogical practice. And they have been clear that putting a thesis or dissertation on a library shelf, which also involves public access to an educational record, is not a problem. Perhaps the art works can be thought of in a similar way. And it may be important that art is made for display; that is what its creators expect, and inclusion in an institutional art exhibit is desirable for them.

So in this example, it seems that both a copyright license, for public display of an art work, and a waiver of FERPA privacy rights are being implied. I think it is important that we separate copyright and FERPA in

our minds, and think about each of them carefully. But it is interesting to see how they diverge and converge.

Finally, what do we make of those assignments where students are asked to do their work in public right from the start, either by creating a web page, developing a blog, posting a video to YouTube, or having a class discussion on Twitter? This is not an abstract question; our faculty are making such assignments all the time. A library school student I know recently told me that she elected not to sign up for a class because of a requirement that each student post a specified number of tweets. Once again, I think that the copyright situation is addressed by an implied license. But what of FERPA? The first question is really whether these kinds of materials are educational records as defined by FERPA in the first place. The issue is whether the “records” are ever “in our keeping” when the student creates them directly on a public platform. It may well be that FERPA is not implicated at all in this scenario, based on a strict reading of its definition of an educational record. And, of course, that reading is entirely congruent with what student expectations must be in this situation; they would hardly expect privacy when their work is a webpage or a set of tweets. In my opinion, however, this does not entirely settle the matter.

Even if FERPA does not apply, some of its principles, based on the idea of protecting our students, are important and should be accounted for. A couple of years ago I was asked precisely this question, and those interested can [read this blog post on the HASTAC site that was written by Professor Cathy Davidson, formerly of Duke and now at the CUNY Graduate Center, based on advice I gave about this type of assignment](#). To summarize that advice here, I suggested three important steps to respect student privacy even if FERPA was not implicated by the assignment to work in a public forum. These steps are, I believe congruent with what I have been saying about implied licenses throughout these two posts. First, students should know about the requirement in advance; they should be informed by the syllabus while they still have an option not to take the class. Second, provision should be made for students to participate pseudonymously, a step that would clearly resolve any FERPA problem that might exist. And, finally, I suggested that provision be made, at least in the instructors own mind, for an alternative assignment that could be available to the student who really needs to take the course but, for whatever reason, does not want to do his or her work in public. Of course, instructors are entitled to assess the validity of those reasons, consider the pedagogical benefit from public work, and evaluate any proffered reasons why a pseudonym would not be a sufficient solution.

I actually suspect that the recalcitrant student who simply does not want class work done in public is a vanishing breed. Most of our students today are very comfortable with having their writing, art works, and opinions on the Web. But when they are not, we should take steps to accommodate their discomfort without compromising the pedagogical value we believe is behind the assignment. Indeed, the fundamental conviction behind all of this extended discussion about student copyright and FERPA rights is to suggest that these legal regimes can be managed in such a way that students are respected while still taking advantage of the pedagogical opportunities that the digital environment offers. Neither of these legal structures needs, or should be allowed, to make the Internet a “no go zone” for student work; they just call on us to think carefully and respectfully about that work, and the students who create it.



# Resistance is Futile

Wed, 25 Feb 2015 14:50:29, ksmithl2@duke.edu, [category: libraries, category: scholarly-publishing]

**This is a guest post by Jeff Kosokoff, the Head of Collection Strategy & Development for the Duke University Libraries.**

In an outstanding example of Buzzword Bingo, EBSCO's Friday press release announcing their acquisition of YBP from Baker & Taylor (B&T) says that they are assembling the tools "to truly streamline and improve administrative ('back end') services in ways that optimize the impact these services have on the end user experience" (EBSCO PR: <https://www.ebsco.com/news-center/press-releases/ebsco-shows-major-commitment> ).

If B&T was trying to move YBP, then there were likely multiple bidders, perhaps ProQuest, perhaps one or more of the major publishing concerns. After all, YBP is one of a small handful of comprehensive book jobbers still standing and they have well-established relationships with a large percentage of libraries. At its core, this is a business decision, and EBSCO is not a charity. The acquisition is a way to maximize profits at a company that has been very good at doing so. There is real value in creating more seamless and streamlined workflows within libraries, and this is especially true where libraries are facing staffing challenges. This recent acquisition, along with the recent demise of Swets, has certainly allowed EBSCO to extend their customer base and increase engagement.

After the initial shock, I suppose not many in the library community were particularly surprised. YBP faces increasing financial challenges as library print book acquisition expenditures fall. As we would expect, the narrative from the parties was upbeat and filled with promises that nothing would change beyond some wonderful synergies to come. EBSCO is continuing to position itself as the closest thing we have to a soup-to-nuts library information content and services vendor. EBSCO claims to be the largest library discovery service provider (6,000+ customers), the leading e-content provider (360,000+ serials, 57,000+ e-journals, 600,000+ e-books). Over the past 20 years, they have moved from a serials jobber to a reseller of abstracting and indexing, a major serials and book jobber, a comprehensive and state-of-the-art discovery service, a contract publisher and aggregator of a massive amount of full-text content through a diverse portfolio of subject databases, an e-book aggregation platform. EBSCO has a strong engagement with development of the KOHA open source ILS. While the materials outcomes are unclear, EBSCO is even a partner in the Open Access Scholarly Publishers Association. Adding YBP also brings in another major library analytics tool, Collection HQ to join EBSCO's Plum Analytics.

So, what's the problem?

## 1. Not Enough Competition?

What are the risks associated with giving too much of your business to a single company? What if things go sour? Many librarians have been frustrated with the dwindling choices we have in the jobber market. In the halcyon summer of 2014, my institution felt like it had three choices for our serials jobbing. When Swets went under last fall, we were left with only two choices. The book jobber market has faced so much consolidation over the past 2 decades that those of us who are dissatisfied with our book jobbers do not feel we have many options.

## 2. Too Big/Monolithic To Fail?

I tend to agree that EBSCO can leverage this merger to enable efficiencies. Those efficiencies will certainly be best realized if a library commits more resources to EBSCO's family of library services and systems. Business risk assessment professionals can offer comment here, but doing too much business with a single corporate entity is fraught with obvious risks. The movement by EBSCO and others to promote end-to-end library systems flies in the face of efforts to modularize library systems and services. Many have been working to build interoperable components instead of single systems. Modularity allows one to both mitigate risk and promote flexibility and evolution of the local set of systems over time. How will we feel limited when it becomes difficult or impossible to replace an unsatisfactory component of a monolithic implementation? The more singular one's commitment to a small number of providers, the impacts of failure and obsolescence grow. And what happens if EBSCO's corporate parent gets into trouble? Admittedly, EBSCO is probably the most diversified company in our space. In fact, it is a little surprising not to see EBSCO's Vulcan Industries competing with Demco and Brodart in the lucrative library fixtures space.

### 3. Can a wholly-owned subsidiary really remain agnostic?

For those of us in the trenches of emerging e-book workflows, a continuing challenge is metadata supply and alignment. This is an emerging area of practice, and while ProQuest, perhaps the major aggregated e-book competitor to EBSCO, says it will be business as usual (PQ Blog: <http://www.proquest.com/blog/pqblog/2015/Support-Continues-with-YBP.html> ), it seems like they might be more than a little nervous. Often a book is available on multiple platforms, and one wonders if long-standing meta-data workflow issues between YBP and EBL will receive the attention they deserve. If I were a smaller e-book publisher that does not want to join with EBSCO's platform, I think would be very anxious about the acquisition.

### 4. Can we learn anything from EBSCO's past behavior?

During my 20-year professional career in libraries, I have witnessed a lot of very aggressive behavior from vendors. In my experience, EBSCO has been one of the most aggressive. In the 1990s, at a time when most discovery providers were content to resell existing databases, EBSCO brought new A&I products to market that directly competed with existing ones in business, health care and the social sciences. While one could argue this drove improvements, the outcome was essentially a doubling of our subscription loads. Combined with exclusive agreements with minor and major periodical publishers such as Time-Warner and Harvard Business Publishing, libraries have sometimes felt that EBSCO was forcing the issue and gaining something of an unproductive advantage. In the discovery space, there are those who feel EBSCO takes an all-or-nothing approach where their systems work great if-and-only-if you also bring along all your subscriptions to their platform.

Consolidation and further amalgamation in the library information services market has been a trend for a few years now. We have fewer ILS vendors, fewer jobbers, bigger players, and lots and lots of financial capital trying to make lots and lots of money in our industry. Perhaps resistance is futile; perhaps it is the only rational choice.

# In the GSU case, the wheels keep turning

Mon, 02 Mar 2015 08:21:31, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

*NB — An embarrassing correction — the motion discussed below was actually filed by the plaintiffs, the publishers, not by GSU. So this does look very much like the publisher intent is to go forward with new proceedings in the District Court. And speculation below about what GSU intends is misplaced. Sorry, folks.*

*Spurred by this error, I have uploaded the [motion, so interested readers can see it here](#)*

Before I get way down in the weeds to describe a new development in the GSU case, I want to tell readers about a [wonderful new article about the case, still in draft form here on SSRN](#), by Brandon Butler, lately of the ARL and now at the George Washington College of Law at American University. This is a clear and concise summary of where we are regarding educational fair use after the Court of Appeals ruling that reversed and remanded the GSU case. It also is as good a set of “instructions” as I have seen for how we can move forward with fair use in the academy; I hope many of you will read it.

And, now, for those who enjoy the more arcane aspects of our law, the latest on that very case.

When last we heard from the Georgia State University copyright infringement lawsuit, the publishers were facing a decision — should they appeal to the Supreme Court, try to settle the case, or let the case go back to the trial court for further proceeding in light of the Court of Appeals ruling?

I have no insight into what is going on in the minds of the plaintiff publishers, or those who are instructing them; all I can say is that I don’t think they have yet filed with the Supreme Court for a Writ of Certiorari. But because of a filing made in the District Court last week, we do now know something about what GSU is thinking, and it seems they are preparing for reconsideration of the case by Judge Orinda Evans.

On February 24, right in the middle of Fair Use Week, GSU filed a motion in Judge Evans’ court to “reopen the record on remand.” When a case is appealed, the trial court “certifies” the record and sends it up to the court that will hear the appeal; that is, the lower court attests that the materials sent to the Appellate level are complete and accurate. Now the case has been sent back to that trial court, and GSU wants to reopen the record — the documentary evidence in the case — so that Judge Evans would base any new opinion on the most up-to-date evidence.

At the root of this request is the fundamental fact in this case that Georgia State, as a state university, cannot be sued for money damages because of sovereign immunity. In other words, they cannot be assessed a fine by the Federal courts for past actions. Early in our nation’s history, we decided that we did not want to give the Federal courts that kind of power to reach into state treasuries and redistribute taxpayer money. So all that a plaintiff suing a state university can hope for is an injunction — a form of order from the court that tells the defendant to stop doing something in the future. There is no looking back at past wrongs when sovereign immunity is in play; only the potential for future violations of the law can be addressed. This is an exception to sovereign immunity from a Supreme Court case called *Ex Parte Young*, and it is supposed to be followed quite strictly.

Those paying close attention may recall that this single-minded focus on the future came into play earlier in the GSU case, when the Regents of the University of Georgia system adopted a new copyright policy. At that time, GSU successfully argued that only actions taken after the new policy was adopted should be considered by the court, since any injunction could only address future actions, which would be governed by the new policy. The trial court agreed, and the case was tried over specific excerpts from books published by the plaintiffs that were used in the GSU e-reserve system *after* the new policy was adopted.

Since the trial, however, the GSU policy has changed again. Specifically, the Regents acted to incorporate into that policy the instructions given them by Judge Evans, who found a couple of flaws in the original form of the new policy. So once again, GSU is asking that they be judged only on the current state of practice, which is the appropriate context for an injunction (which always looks forward). They are asking that the record be reopened so that, in her reconsideration of the case, Judge Evans would evaluate only excerpts used in GSU's e-reserves since the original trial and the subsequent amendment of the copyright policy.

If this motion is granted, and it makes sense both under the legal rule of *Ex Parte Young* and the past history of the case, the publishers would have to look at more recent semesters than were the subject of the original trial, and see what excerpts, if any, from works they own were used for e-reserve after the 2012 ruling. If they find any that they think are infringing, it would be those materials, rather than the "original" 75 excerpts, that would be the subject of Judge Evans' reconsideration.

In short, GSU is asking that those "further proceedings consistent" with the Court of Appeals ruling, be focused on a new set of excerpts, ones used by the GSU faculty since the copyright policy was last revised.

If the motion is granted, the new proceedings in the trial court would have a very different look. There would not necessarily be a new trial, but at least the Judge would have to reconsider her approach to fair use based on what the Court of Appeals has told her, and then apply that revised approach to a different set of readings. It seems clear that GSU believes that this would improve the chance that she would still find lots of fair uses. Perhaps they are more confident that the revised policy is being followed and, since it was revised based on the Judge's instructions, it will still pass muster with her. Perhaps GSU has been careful not to use many, or any, of plaintiffs' works since the trial. And, perhaps, this is a gambit in settlement negotiations.

I will be anxious to see how the Judge responds to this motion, if the case reaches the point for her to rule on it. I suspect that the publishers will see this request as a kind of trickery, designed to pull the rug out from under them and fight the case on new terrain. But they knew the boundaries when they sued a state institution, or at least they should have. From another perspective, this motion reflects an attempt by GSU to be consistent, and even to act with integrity. If they believe, as I think they do, that they have tried at every turn to employ fair use as it has been clarified for them by the courts, this is nothing more than a plea to be judged on their current understanding and current practice, which seems very fair and appropriate.

# Copyright, Open Access, and Human Rights

*Fri, 13 Mar 2015 08:54:36, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The United Nations Human Rights Council is holding its 28th session this month, and one item on the agenda is discussion about a report from Farida Shaheed, who is a “Special Rapporteur” in the area of “cultural rights.” [Ms. Shaheed is a well-known Pakistani sociologist and human rights activist](#). Her [report is a remarkable document](#) in many ways, with a lot of things to like for those who are concerned about the overreach of copyright laws. There are also some points that are troubling, although, on balance, I would love to see this report get attention and action from the U.N.

In some sense, the most remarkable thing about this report is its frank recognition that intellectual property laws are in tension with the fundamental human right of access to science and culture. In only its third paragraph, the report reminds us that since at least 2005, the World Intellectual Property Organization, a U.N. agency, has been mandated (whether effectively or not) to give “renewed attention to alternative policy approaches to promote innovation and creativity without the social costs of privatization.” In short, the WIPO is charged, whether effectively or not, to find ways to facilitate open access to science and culture. This charge is made explicit in the recommendations, where the Special Rapporteur directly suggests that “[p]ublic and private universities and public research agencies should adopt policies to promote open access to published research, materials, and data on an open and equitable basis, especially through the adoption of Creative Commons licenses” (para. 113).

When librarians and other open access advocates discuss OA policies with their faculties, perhaps we should recognize that there is a compelling argument to be made that this is not just a “what’s best for academia and for my interests” issue, but a true human rights issue. Ms. Shaheed’s report makes this case in a concise and compelling way. And this point also reminds us of why open access that is achieved simply by paying the commercial publishers to release articles is not a solution, because it does not really promote equitable access. The fees charged are too high for many authors, they are not administered in a transparent way, and, frankly, some of the publishers cannot be trusted to fulfill their end of the bargain. Barbara Fister discussed some of these problems in more detail in her recent *Inside Higher Ed* blog post, called “[New Predatory Publishing in Old Bottles](#).” If we take open access seriously as a step toward a more democratic and equitable culture, we must embrace a wider variety of “flavors” of OA, and not assume that the “usual suspects” can do it for us.

To return to a reading of the Human Rights Council report, there are strong endorsements of the idea that cultural and scientific development depends on restraining the reach of IP protections. The section on “Copyright policy and cultural participation” is structured around three themes that all begin with “promoting cultural participation through...” and then go on to discuss copyright limitations and exceptions, international cooperation, and open licensing. Here are some specific recommendations that I found very encouraging:

- In regard to negotiations that are already underway, the report endorses ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Disabled, or Otherwise Print Disabled. On the other hand, Ms. Shaheed expresses concern (para 19) about the Trans-Pacific Partnership Agreement that is currently being negotiated in secret, which is the problem that the report focuses on, calling for all such multinational agreements to be discussed in a transparent way (para 92). Since the TPP is often defended with the claim that it will benefit developing countries, it is fascinating to see it cited as an example of a

“democratic deficit in international policy making.” From a different article, this [editorial about the TPP by a U.S. Senator](#) raises the same type of concern, and together they make a strong case against the agreement.

- In paragraph 22 the report discusses the potential that a pervasive licensing environment can inhibit artistic self-expression and slow cultural development.
- The report calls for the adoption of international treaties on copyright limitations and exceptions for libraries and education. Given the current climate in the WIPO, this seems like a long shot, but is valuable in part because it calls attention to that climate, which is dominated by representatives of commercial interests (including, unfortunately, the U.S. Trade Representative).
- On the issue of copyright limitations and exceptions, the report specifically points to fair use as a tool for allowing a more “comprehensive and adaptable” approach to unlicensed uses (para 73). The report notes that most countries take the route of adopting exceptions for specific types of use, which provides more certainty, but adds that that approach may be inadequate in the current environment. In general the report calls for a flexible approach to “uncompensated use of copyrighted works, in particular in contexts of income disparity, non-profit efforts, or under-capitalized artists” (para 106). It specifically asserts, in this regard, that member states should not take a rigid approach to the so-called “three-step test” for copyright exceptions that is found in the Berne Convention (para 104), which is often used as a weapon by commercial interests against broadly applicable exceptions.
- One of the recommendations I like best in this report, found in paragraph 107, is that states should enact laws that would prevent copyright limitations and exceptions from being overruled by contractual provisions, and protect such exceptions from excessive technological interference as well. The UK has recently adopted the contractual part of this idea, stating that certain uses that are allowed by the law cannot be prohibited by contracts. As I have [said before](#), this is an idea we need to incorporate into U.S. copyright law, and it is good to see the U.N. special rapporteur endorse it so firmly.

There is an overall emphasis in the report that focuses on copyright as an authors’ right, and it is this focus that gives me some ambiguous feelings about the document. On the one hand, I agree that a focus on authors and supporting authorship will help re-balance our approach to copyright. Where we have most often gone wrong in this area is when we have allowed copyright discussions to focus on supporting the business models of intermediary organizations, regardless of whether or not those models really helped incentivize authors and creators. Throughout its history, copyright has been called an authors’ right and treated like a publishers’ privilege. Re-focusing on authors is part of restoring copyright to its proper function, and makes sense in a document about human rights. And yet, it is also true that too much stress on author rights can also become unbalanced. Copyright cannot benefit society unless it weighs the rights of both users and creators, especially since the former often aspire to become the latter. Authorial control is an important part of the creative incentive, but it can easily go too far.

One troublesome area where this is a real danger is protection for “traditional knowledge and traditional cultural expressions” — the cultural creations of indigenous peoples. This is an area where there have [certainly been abuses](#), and it is not surprising to find a concern over TK and TCE, as the international community abbreviates them, in a report about IP and human rights. Unfortunately,

protection for these cultural products raises as many problems as it does solutions. Should there be a public domain for TCEs? If not, why not? And who is the legitimate rights holder in traditional knowledge? The national government? In an [article back in 2011, David Hansen explored some of these issues](#) and found real incompatibility between traditional knowledge protections and the values that animate IP law.

So my final attitude toward this report is mixed, but still strongly positive. I think it recommends many of the right steps toward restoring copyright and other IP rights to their proper scope and function. It rightly places the focus on authors and on economic and cultural development. It reminds us that all high-level copyright conversations should have a human rights perspective. Where I have concerns, I see a chance for continued conversation. But at least those conversations would take place with the proper grounding, if the report is taken as seriously as it deserves.

# Listening to Lessig

*Wed, 01 Apr 2015 08:02:24, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Like many other attendees, I was pleased when I saw that the closing keynote address for this year's Association of College and Research Libraries Conference was to be given by Professor Larry Lessig of Harvard. But, to be honest, my excitement was mingled with a certain cynicism. I have heard Lessig speak before, and I am afraid I worried that I would be listening to essentially the same lecture again.

My suspicion was not wholly unwarranted. In part I think it is the fault of Lessig's instantly recognizable lecture style. It is energetic and entertaining, but because its rhythms and conventions are so idiosyncratic, I think it may flatten the message a little bit.

In any case, I sat down in the ballroom of the Oregon Convention Center on Saturday with somewhat mixed expectations. But what I did not expect was for Lessig to begin his talk by acknowledging that all his public lectures were really the same. Had he read my mind? No, his point was a little different. Over the years, he told us, he has had three major themes — political corruption, net neutrality, and copyright/open access. But, he told his audience of attentive librarians, those three themes are fundamentally just one theme. Each is about equality. Not three themes, but only one — equality. Equality of access to the political process is the heart of his current campaign against the corruption of our political system by the endless pursuit of money. Equality of access to the means of communication and culture is key to the fight for net neutrality. And equality of access to knowledge is what animates the open access movement.

So it turns out that my worry, prior to the talk, was both unfair and, in a sense, correct. All Lessig's lectures *are* very much the same, because the underlying value he is asking us to focus on is the same.

Thinking about this unity-behind-diversity in the messages about political corruption, net neutrality and open access set me thinking about the way my colleagues and I frame our advocacy for the last of those items, open access to scholarship. Our messages, I think, tend to focus on incremental change, on the benefits to individual scholars, and on not rocking the academic boat too much. Lessig reminded me that there are good reasons to rock a little bit harder. Publishing in toll access journals and neglecting open access options or additional means of dissemination is not just short-sighted. It is dumb, and it is harmful. We need to say that occasionally.

Publishing exclusively through closed access channels is dumb because it ignores huge opportunities available that can, quite simply, make the world a better place. And such publishing fails to take full advantage of the greatest communications revolution since the printing press. Indeed, online toll-access deliberately breaks network technology in order to protect its outmoded and exclusionary business model. Doing this is simply propping up the buggy whip manufactures because we are afraid of how fast the automobile might travel. The academy is not usually this dumb, but in this case we are wasting vast amounts of money to support an obsolete technology. I know that the promotion and tenure process is often cited as the reason for clinging to the old model, but this is simply using one outdated and inefficient system as an excuse for adhering to another such system. Traditional modes of evaluation are breaking down as fast as traditional publishing and for the same reasons. Hiding our heads in the sand is no solution.



More to the point, however — more to Lessig’s point — is the fact that this traditional system we are so reluctant to wean ourselves from actually hurts people. It fosters ignorance and inequality. It makes education more difficult for many, retards economic progress, and slows development worldwide. As academics and librarians who by inclination and by professional responsibility should be committed to the most universal education possible, it is shameful that we cling to a system where only the rich can read our scholarship, only the privileged gain access to the raw materials of self-enlightenment. How can a researcher studying the causes and treatments of malaria, for example, be satisfied to publish in a way that ensures that many who treat that disease around the globe will never be able to see her research? How can an anthropologist accept a mode of publishing that limits access for the very populations he studies, so they will never be able to know about or benefit from his observations? Why would a literary scholar writing about post-colonialist literature publish in a way that fosters the same inequalities as earlier forms of colonialism did?

In this wonderful [column from Insider Higher Ed., the ever-insightful Barbara Fister writes](#) about what we really mean when we talk about serving a community, and what we might mean by it. She comments on the “members-only” approach to knowledge sharing that has become an accepted practice, and challenges us to rethink it. Like Lessig, Fister is calling us to consider our core values of equality and the democratization of knowledge. She also reminds us of how dumb — her word is wasteful — the current system is.

Perhaps the most vivid example of how subscription-based publishing fosters, and even demands, inequality is found in the [ongoing lawsuit brought against a course pack publisher in India by three academic publishers](#). Two of the “usual suspects” are here — Oxford University Press and Cambridge University Press (joined, in the Delhi University suit, by Taylor and Francis) — and this lawsuit is even more shameful than the one brought against Georgia State. The problem, of course, is that the books published by these modern-day colonialists are too expensive for use in India. I once was told by a professor of IP law in India that a single textbook on trademark law cost over a month’s salary for his students. Photocopying, whether it is authorized by Indian law or not (and that is the point at issue) is a matter of educational survival, but these publishers want to stop it. Their rule — no one should ever learn anything without paying us — is a recipe for continued ignorance and inequality. It is disgraceful.

I use the word colonialists in the paragraph above quite deliberately. What we are seeing here is the exploitation of a monopoly that is imposed on a culture with the demand that people pay the developed world monopoly holders in order to make progress as a society. We have seen this too many times before.

The thing I like best in the article linked above — the whole thing is well worth a careful read — is the brief story of how a student group in India began handing out leaflets about the lawsuit at a book fair where CUP representatives were hawking their wares. They wanted to let people know that buying books from Oxford and Cambridge is supporting a worldwide campaign of intimidation that is aimed at reducing access to knowledge and culture. Publishing with these presses is a form of colonial occupation that extorts from whole populations a high price to obtain the means of cultural and intellectual growth. The reaction, of course, was predictable; the publisher summoned the police to protect themselves and others from these unpleasant truths. But the technique has merit; perhaps we can also find ways to shame these publishers when they attend our academic or professional conference, when they send salespeople to our campuses, and when they recruit our colleagues to write and review for them. A commitment to equality demands no less.

# A new home for copyright?

*Tue, 14 Apr 2015 05:18:43, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: libraries]*

The idea that the Copyright Office should move out of the Library of Congress was first raised some years ago by Bruce Lehman, who was, at the time, the Director of the Patent and Trademark Office. The idea seemed to be that the Copyright Office should join the PTO as an agency within the Commerce Department. That idea did not seem to be very well-received by many, and I had not heard of the discussion for a while. But apparently the possibility of moving the CO is still kicking around, and last month current Registrar of Copyright Marie Pallante sent a [letter about the topic](#) to Rep. John Conyers, the Ranking Member of the House Committee on the Judiciary. Her letter was requested after a [hearing about the functions and resources of the CO](#) held back in February.

Pallante's letter makes interesting reading, especially if one is interested in the inside politics of Executive Branch appointments, separation of powers, and the like. The bottom line, however, is that Registrar Pallante thinks that the Copyright Office should be separated from the Library of Congress, should not move into the Commerce Department, and should instead become an independent agency with its leader directly appointed by the President and confirmed by the Senate. There has been some discussion about this letter and the ramifications of the debate among my colleagues, and I want to consider two issues that I think are of interest to a wider audience, while admitting that I am shamefully cribbing ideas from those colleagues.

The first issue is why the Copyright Office should leave the Library of Congress in the first place. Registrar Pallante offers several reasons in her letter. One is the claim that the Library of Congress is in a Constitutionally awkward position, since it is apparently an Executive branch agency (the Librarian is appointed by the President), but its functions, including advising Congress about copyright law, are at least partially legislative. While I see the issue, it is not clear to me why it is more pressing for the CO than it is for other offices within the Library, including, for example, the Congressional Research Service. Nor do I fully understand why making the CO an independent agency, with its head still appointed by the President, would solve this dilemma. There is certainly an issue of prestige here, but I am not convinced that it is enough to justify a new Federal agency.

The other reason Pallante offers for moving out of the Library of Congress are the "operational challenges," including staffing and pay. All bureaucracies are difficult, of course, and rumor has it the LoC is more difficult than most these days. But, again, it is not obvious that a new agency would necessarily be better. Everything would depend on the personnel and the budget. More troubling, however, are the footnotes in Pallante's letter that refer to the "conflict of interest" between the CO and the Library, which apparently was mentioned by some witnesses during those February hearings.

Is there a conflict of interest between a library and the office that administers our national copyright policy? If there is, what does that tell us? To my mind, it suggests that our copyright policy has gotten out-of-line. We may be developing an approach that sees copyright as a trade regulation that protects specific industries, not as a policy decision about how best to ensure the continuous creation of new works of knowledge and culture.

This concern was clearly raised during the hearings, where Rep. Zoe Lofgren challenged the assumption that the Copyright Office was no longer a good fit with the Library of Congress by suggesting that over the years, the librarians have been better at understanding copyright than some staff at the CO. To her

credit, in her letter Pallante does not endorse the idea of moving the CO to Commerce, where the symbolism of copyright as a sort of trade regulation would be even stronger. But I would argue that our predecessors knew what they were doing when they [centralized copyright services inside the Library of Congress](#). Libraries epitomize the social benefits that copyright is supposed to support, and the “optics” of moving the Office, at least, would inevitably undermine that long-standing commitment to the public good.

In fact, if the CO was located in the Commerce Department, as my colleague Brandon Butler points out, it would have to consider all aspects of commerce related to copyright, including those industries that depend on fair use and other copyright exceptions. The wrong-headed narrative about the competition between the content industry and the technology sector, with the former held up as copyright dependents and the latter as modern-day pirates, would be harder to sustain. The unfortunate possibility exists that the CO’s desire for independence represents a desire to become even less balanced in its approach than it has been in the past, focusing entirely on its perceived role as enforcer of rules that protect Hollywood from the threatening innovations of Silicon Valley. An office in the Commerce Department would be less able to take sides.

In terms of rationale and purpose, the Library of Congress is a good fit for the Copyright Office, even if the CO does not, under its current leadership, recognize this. If a new home is really necessary, Butler makes the wonderful suggestion that the Department of Education should be considered. The DoE, more than Commerce and maybe even more than the Library of Congress, could refocus copyright policy on the reason we have these laws in the first place — to promote the progress of knowledge and science. If we lose track of that purpose, it becomes an open question whether we need the law or the CO at all.

# Steps toward a new GSU ruling

*Mon, 27 Apr 2015 08:50:28, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: libraries]*

It looks more and more like we will get a new ruling from the trial court in the Georgia State case about what is or is not fair use for digital course readings. The case, of course, was reversed and remanded to the trial court after the publishers appealed the initial decision to the 11th Circuit, with instructions to produce a new opinion consistent with the Court of Appeals ruling. The publisher plaintiffs then [asked the trial court to reopen the record](#) in the case and apply the putative new fair use analysis to a different, more recent, set of readings employed by the GSU faculty. The University opposed this motion, arguing that [what would amount to a whole new trial was not necessary](#).

Last week, District Court Judge Orinda Evans [dismissed the motion to reopen the record](#) and issued an order about briefing the court on what a new analysis of fair use for the original excerpts considered in the trial should look like. Judge Evans wrote that “It does not make sense at this juncture to spend months, probably longer, on what considerations might govern if Plaintiffs prove they are entitled to injunctive relief by virtue of the claimed 2009 infringements.” The motion is dismissed without prejudice, meaning that the plaintiffs can renew it at a more appropriate time, although I must admit that I do not see what that would mean if the case is to go forward on the original set of readings.

It appears that once again the publishers have failed in an effort to broaden the scope of the case beyond the item-by-item fair use analysis that has already been done and to possibly reintroduce some of the broad principles that they really want, which have so far been rejected at every stage. Now Judge Evans has explicitly told them, in her scheduling order, that what is required is “consideration and reevaluation of each of the individual claims” in order to redetermine “in each instance... whether defendants’ use was a fair use under 17 U.S.C. section 107.” Her schedule for the briefs is tight, with an end of the briefing now scheduled just two and a half months from now. Presumably we would still have a long wait while Judge Evans applies revised reasoning about fair use to each of the individual excerpts, but it looks a bit more like that is what is going to happen.

# Copyright follies

Thu, 30 Apr 2015 06:53:46, ksmithl2@duke.edu, [category: copyright-issues-and-legislation]

The joy of being a copyright specialist is the amazing array of cool, beautiful, and profound things that make up the raw material of what we do. It is a privilege to be granted even a tiny window into the creativity of the many people we get to work with. And even the cases we only read about share in this astonishing diversity.

But let's be honest. There is also a lot of nonsense in the copyright world. The idea of "owning" creative expression just makes some folks go a little nuts, and some pretty absurd claims get made about copyright (monkey selfies, anyone?). So here is a quick review of some recent bizarre cases, although by the end of it we will have the opportunity to review some important principles about copyright law.

Perhaps a good place to begin is with the [claim by descendants of Nazi Propaganda Minister Joesph Goebbels that they are entitled to licensing fees](#) for quotes from Goebbels' diaries that are used in a new biography of him. One of the strangest things about this case is that it may well be a valid claim, although there is some dispute over who actually is the copyright holder, since most assets of the Nazi leaders were seized by the Allies after the war. But the very fact that it is being raised suggests some interesting questions. How much money would make it worthwhile to publicly identify oneself as a descendant of one of the worlds most vilified war criminals, an architect of the "final solution?" And will there be a fair use/fair dealing defense raised, as the [blog Techdirt has suggested](#)? It certainly seems like we should avoid a situation where a war criminal's family would be in a position to censor a biography of him, which would be one possibility if they were found to hold copyright. Random House seems mostly to assert the "no money to a war criminal" defense against the claim, but it is worth remembering that copyright is not only about money, it is about control.

Just before publishing this post I saw an excellent analysis of the issue of royalties for ex-Nazi's or these descendants [here, in Inside Higher Ed](#).

Another development this past week was the filing by John Deere in regard to a proposed exception to DMCA anti-circumvention rules in which they [claimed that the software in a tractor is only licensed to a consumer, not owned by them](#). It was inevitable that such a claim would be made eventually, and I predicted it somewhat eerily in this [post from last year](#) (substituting John Deere for Ford). John Deere wants to sell you a tractor, and they are fine with you using it as you wish, unless you decide to modify the software. At that point they assert that you, the purchasers, only have an implied license to use the software and that anti-circumvention rules would prevent modification, and should continue to do so. What makes this claim more dangerous than absurd is that it raises the idea of new limitations on what we mean by ownership. We thought that the doctrine of First Sale was sufficient to protect the traditional idea of ownership in regard to copyrighted material, but the DMCA, and the desire of some companies to suppress competition, has changed that. What new and un-imagined restrictions on my use of the tractor in my driveway might be down the line from John Deere? We are getting ever closer to the point where our courts will need to develop clear guidelines about what it means to own a machine that incorporates copyrighted material. In the meantime, I would think twice before I "bought" a John Deere tractor; I like to know what I am getting for my money, and John Deere seems to think they can upend my reasonable expectations whenever it suits them.

Most readers are likely already familiar with the next of the follies I want to discuss: the [claim made on behalf of the bystander who filmed the police shooting of Walter Scott](#) in South Carolina that he, the

bystander, is entitled to a licensing fee — apparently as much as \$10,000 — every time the media replays the video. There are two especially troubling aspects of this claim. The first is the absurd misunderstanding that leads to a statement that the fair use “period” has “expired” for this video. There is not a time limit on fair use, of course. It seems to me that a few people are confusing fair use, a statutory boundary on copyright that lasts as long as the rights do, with the so-called “hot news” doctrine. The latter was the [creation of courts](#), is of uncertain application, and was largely preempted by the 1976 copyright act. In fact, the hot news doctrine was a limit on the exclusivity that a news organization could have over its report of newsworthy events, so the doctrine acted in the reverse of how it is being asserted, under the wrong name, in the Scott shooting video case. Fair use continues to exist in spite of the lapse of time, and only a very poorly-advised news organization would accept this idiotic argument.

Which brings me to the most troubling aspect of this case, the apparent fact that the New York Times agrees that fair use can expire. According to the Forbes report linked above, the NYT claimed that “copyright experts” agreed that this alleged fair use period has passed. They quote a lawyer for the Copyright Clearance Center (hardly a disinterested party) whose argument, while using temporal language, can only sensibly refer to the specific conditions surrounding a particular use (i.e. whether the use is for the purpose of news reporting or not). I wonder if the CCC can cite any case law for this proposition that fair use can expire? If not, then they and the NY Times are just spreading FUD which, at least for the Times, is unexpected and reprehensible.

Finally, I want to briefly comment on this story about a former researcher who is [suing his former post-doctoral adviser at Brown University for having published an article that they apparently wrote together](#) without giving authorship credit to the former post-doc. There are complicated details to the case, and I would not like to offer an opinion about who is right or wrong in the overall dispute. But the controversy raises one issue that I do want to comment on: the situation between joint authors. So much of the scholarship produced today is written by multiple authors — I recently saw an article with 102 listed authors — that it is increasingly important to understand a couple of points.

First, to qualify as a joint author in the copyright sense, each author must contribute protectable expression to the preparation of the overall work. That means that some, at least, of those 102 authors are not co-owners of the copyright because their contributions did not involve the creation of protectable expression. We don’t worry too much about this distinction in the academic world, but it could be an issue if a dispute over publication arises, as it has in the Brown University case described above.

Second, it is important to understand that each co-owner of the copyright, each joint author, is entitled to exercise the rights in the copyright bundle independently. That means that one author can conceivably authorize publication without the permission of the other authors, as seems to have happened in this situation. On the copyright issue, at least, it seems clear that the post-doc cannot object to publication simply because the article he worked on with others was published by one of them without his knowledge or consent. The author who published would be obligated to account to all co-authors for any profits from the publication, but it would not be infringement to simply publish the article without consent from the others.

This precise situation, also involving a dispute about how authors were listed, was considered by the Seventh Circuit Court of Appeals in 1987 in a case called [Weinstein v. the University of Illinois](#), and the panel of judges, two of whom were themselves well-known academics, came to the same conclusion — no infringement when one co-owner of the copyright publishes without permission from the others. So

whatever the other details are in the Brown case, a copyright claim against the former adviser from one of his co-authors is unlikely to be successful. This is why it is so important (especially in cases like this involving commercial sponsorship) for all of the authors to agree together about the use and publication of any intellectual property that arises from the project. That sort of agreement, worked out calmly and in advance of any conflict, is still the best way to avoid being involved in any copyright follies.

# Stepping back from sharing

*Mon, 04 May 2015 11:55:46, ksmith12@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The [announcement from Elsevier](#) about its new policies regarding author rights was a masterpiece of doublespeak, proclaiming that the company was “unleashing the power of sharing” while in fact tying up sharing in as many leashes as they could. This is a retreat from open access, and it needs to be called out for what it is.

For context, since 2004 Elsevier has allowed authors to self-archive the final accepted manuscripts of their articles in an institutional repository without delay. In 2012 they added a foolish and forgettable attempt to punish institutions that adopted an open access policy by purporting to revoke self-archiving rights from authors at such institutions. This was a vain effort to undermine OA policies; clearly Elsevier was hoping that their sanctions would discourage adoption. This did not prove to be the case. Faculty authors continued to vote for green open access as the default policy for scholarship. In just a week at the end of last month the University of North Carolina, Chapel Hill, Penn State, and Dartmouth all adopted such policies.

Attempting to catch up to reality, Elsevier announced last week that it was doing away with its punitive restriction that applied only to authors whose institutions had the temerity to support open access. They now call that policy “complex” — it was really just ambiguous and unenforceable — and assert that they are “simplifying” matters for Elsevier authors. In reality they are simply punishing any authors who are foolish enough to publish under these terms.

Two major features of this retreat from openness need to be highlighted. First, it imposes an embargo of at least one year on all self-archiving of final authors’ manuscripts, and those embargoes can be as long as four years. Second, when the time finally does roll around when an author can make her own work available through an institutional repository, Elsevier now dictates how that access is to be controlled, mandating the most restrictive form of Creative Commons license, the CC-BY-NC-ND license for all green open access.

These embargoes are the principal feature of this new policy, and they are both complicated and draconian. Far from making life simpler for authors, they now must navigate through several web pages to finally find the list of different embargo periods. The [list itself is 50 pages long](#), since each journal has its own embargo, but an effort to greatly extend the default expectation is obvious. Many U.S. and European journals have embargoes of 24, 36 and even 48 months. There are lots of 12 month embargoes, and one suspects that that delay is imposed because those journals that are deposited in PubMed Central, for which 12 months is the maximum embargo permitted. Now that maximum embargo is also being imposed on individual authors. For many others an even longer embargo, which is entirely unsupported by any evidence that it is needed to maintain journal viability, is now the rule. And there is a handful of journals, all from Latin America, Africa, and the Middle East, as far as I can see, where no embargo is imposed; I wonder if that is the result of country-specific rules or simply a cynical calculation of the actual frequency of self-archiving from those journals.

The other effort to micromanage self-archiving in this new policy is the requirement that all authors who persevere and wish, after the embargo period, to deposit their final manuscript in a repository, must apply a non-commercial and no derivative works limitation on the license for each article. This, of course, further limits the usefulness of these articles for real sharing and scholarly advancement. It is



one more way in which the new policy is exactly a reverse of what Elsevier calls it; it is a retreat from sharing and an effort to hamstring the movement toward more open scholarship.

The rapid growth of open access policies at U.S. institutions and around the world suggests that more and more scholarly authors want to make their work as accessible as possible. Elsevier is pushing hard in the opposite direction, trying to delay and restrict scholarly sharing as much as they can. It seems clear that they are hoping to control the terms of such sharing, in order to both restrict its putative impact on their business model and ultimately to turn it to their profit, if possible. This latter goal may be a bigger threat to open access than the details of embargoes and licenses are. In any case, it is time, I believe, to [look again at the boycott of Elsevier](#) that was undertaken by many scholarly authors a few years ago; with this new salvo fired against the values of open scholarship, it is even more impossible to imagine a responsible author deciding to publish with Elsevier

# Learning how fair use works

Thu, 07 May 2015 08:43:11, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

How many cases about fair use have been decided in the U.S. since the doctrine was first applied by Justice Story in 1841? Take a minute to count; I'll wait.

If you came up with at least 170, the Copyright Office agrees with you. Last week they announced a fascinating new tool on the CO website, an [index of fair use cases](#). That index contains summaries of approximately 170 cases, along with a [search tool](#). The introductory message, however, acknowledges that the index is not complete, so those of you who thought there were more than 170 cases are almost certainly correct.

This index is potentially a very useful tool, and it also raises some interesting questions. I want to consider the questions first, then discuss how the new fair use index might be used by someone who wanted to learn more about how fair use works (which, by the way, is one of the avowed purposes behind its development).

Coverage is the obvious first question, and, as I said, the CO acknowledges that it is incomplete. Specifically, it seems heavily weighted toward more recent cases. There are only 11 cases listed in the index dating to before 1978, and two older cases (1940 and 1968) that are presented in my law school casebook on copyright as important fair use precedents are not included. So it looks like there are some pretty significant gaps, which one hopes the Copyright Office will address as it continues to develop this tool.

By the way, the issue of continuing development also brings up the question of why the C.O. thought this was a worthwhile investment. It looks useful, to be sure, but there are other sources for similar data, so it is a bit curious that the C.O. chose this among all its potential priorities.

To return to the issue of coverage, it is always important to ask which specific cases were chosen and how they are characterized. Of the 170 cases, there are 78 for which the result is listed as "Fair use not found," and 64 in which the C.O. says that fair use was found. The remaining 29 are listed as "Preliminary ruling, mixed result or remand." This last category is rather unhelpful. For example, the *Authors Guild v. HathiTrust* case is listed this way, even though it was a strong affirmation of fair use and the remand involved a fairly unimportant issue of standing. Even more surprising is the fact that this "mixed result" tag is applied to *Campbell v. Acuff Rose Music*, the "Oh Pretty Women" case from the Supreme Court that is at the heart of modern fair use jurisprudence. Again, this was a clear fair use win; the case was remanded only because that is what the Supreme Court usually does when it reverses a Court of Appeals' decision. So the representation of the holdings is technically accurate, it seems, but not as helpful as it might be in actually focusing on the fair use aspect; while some "mixed result" case genuinely were that — fair use was found on one issue but not for another — many of the remanded cases actually did involve a clear yea or nay about fair use, and it would be more helpful to categorize them that way.

A particularly useful feature of this index is the ability to limit the listings by jurisdiction (the Appellate Circuits) and by topic. For example, limited to just cases out of the Fourth Circuit, where I reside, I find that the Court has ruled on seven fair uses case and upheld fair use in six of them. The seventh was one of those genuinely mixed results, where one challenged use was held to be fair and another was not.

If we limit the subject area of the cases to those labeled “Education/Scholarship/Research,” fair use seems to fare better than it does overall. In that category of 42 total cases there are 18 findings in favor of fair use and 16 rejections. Of the remaining 8 mixed results, at least two of them — the HathiTrust Case and the GSU case — should be seen as affirmations of fair use, even if the parameters of that use are still unsettled in GSU. So the impression many of us have that educational and scholarly uses are a bit more favored in the fair use analysis than other types of cases seems to be confirmed.

Things get more interesting when we look just at the Supreme Court in this index, and the issue of how cases are chosen is again highlighted. The index shows four fair use cases, with one holding in favor of fair use (*Sony v. Universal Pictures*), one mixed result (*Campbell*, as discussed above), and two rejections of fair use (*Harper v. Nation* and *Stewart v. Abend*). This last case, *Stewart v. Abend*, is actually almost never treated as a fair use case; while fair use was dismissed as a potential defense in the case, the real issue involved assignments of copyright and who could exercise the renewal right that existed at that time. And this case was remanded, just as *Campbell* was. So it is odd that *Campbell*, with its central finding in favor of fair use, is shown as a mixed result, while *Stewart v. Abend*, where fair use was tangential and there was also a remand, is tagged as a rejection of fair use. This suggests at least an unconscious bias against fair use findings.

A different listing of Supreme Court fair use cases, on the [IP Watchdog site](#), includes several additional cases — nine, in all — but does not list *Stewart v. Abend* as one of them. Several of the cases included by IP Watchdog do not seem to me to really focus on fair use, so I am not saying that the C.O. has under-reported the cases. But the very different lists do suggest that it is a surprisingly subjective undertaking just to identify the cases that should be included in a fair use index.

Finally, the analysis provided in the C.O.’s case summaries needs to be considered carefully. To take one example, for the recent case of *Kienitz v. Scoonie Nation*, about which [I wrote earlier this year](#), the short note about the holding ignores the thing that may be most significant about the case — the reluctance of Judge Frank Easterbrook to apply a “transformation” analysis to the fair use question (HT to my friend and colleague David Hansen for pointing this out). Again, this is not necessarily a problem, and the case summary of *Kienitz* at the [Stanford Copyright & Fair Use](#) site has a similar synopsis, but it is a reminder that these projects are always created by individuals with specific perspectives, viewpoints and limitations.

Even with all these caveats, I think the Copyright Office has created a useful tool, which can be used by those interested to learn a lot about how fair use is applied, especially by looking at the different categories. The Stanford site, linked above, and especially its own, [much shorter list of cases](#), might usefully be used alongside the C.O. index. The Stanford descriptions are very tightly focused on the fair use issue, so reading them in conjunction with the C.O. summaries, with their attention to procedural matters that sometimes obscure the fair use holding, might produce a more balanced approach.

In any case, this new tool from the Copyright Office, and some of the tools that predate it, remind us that the best way to understand fair use, and to become comfortable with it, is to look closely at the cases, both in the aggregate and individually. This C.O. database offers a statistical perspective, as well as the ability to focus on parody, or music, or format-shifting, while the Stanford summaries emphasize in a few words the core of the fair use analysis. Both point the interested reader to full opinions, where the analysis can be understood in the context of all the facts. Combined in this way, these resources offer a terrific opportunity for librarians, authors, and others to dig deeply into the nuances of fair use.

# From control to contempt

*Fri, 15 May 2015 12:53:58, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

I hope it was clear, [when I wrote about](#) the press release from Elsevier addressing their new approach to authors' rights and self-archiving, that I believe the fundamental issue is control. In a comment to my original post, Mark Seeley, who is Elsevier's General Counsel, objected to the language I used about control. Nevertheless, the point he made, about how publishers want people to access "their content," but in a way that "ensures that their business has continuity" actually re-enforced that the language I used was right on the mark.

My colleague Paolo Mangiafico has suggested that what these new policies are really about is capturing the ecosystem for scholarly sharing under Elsevier's control. As Paolo points out, these new policies, which impose long embargo periods on do-it-yourself sharing by authors but offer limited opportunities to share articles when a link or API provided by Elsevier is used, should be seen alongside the company's purchase of Mendeley; both provide Elsevier an opportunity to capture data about how works are used and re-used, and both reflect an effort to grab the reins over scholarly sharing to ensure that it is more difficult to share outside of Elsevier's walled garden than it is inside that enclosure.

I deliberately quote Mr. Seeley's phrase about "their content" because it is characteristic of how publishers seem to think about what they publish. I believe it may even be a nearly unconscious gesture of denial of the evident fact that academic publishers rely on others — faculty authors, editors and reviewers — to do most of the work, while the publisher collects all of the profit and fights the authors for subsequent control of the works those authors have created. That denial must be resisted, however, because it is in that gesture that the desire for control becomes outright disrespect for the authors that publishing is supposed to serve.

Nowhere is this disrespect more evident than in publisher claims that the works they publish are "work made for hire," which means, in legal terms, that the publisher IS the author. The faculty member who puts pen to paper is completely erased from the transaction. To be clear, as far as I know Elsevier is not making such a claim with its new policies. But these work made for hire assertions are growing in academic publishing.

Three years ago [I wrote about an author agreement](#) from Oxford University Press that claimed work made for hire over book chapters; that agreement is still in use as far as I am aware. At the time, I pointed out two reasons why I thought OUP might want to make that claim. First, if something is a work made for hire, the provision in U.S. copyright law that allows an author or her heirs to terminate any license or transfer after 35 years simply does not apply. More significantly, an open access license, such as is created by many university policies, probably is not effective if the work is considered made for hire. This should be pretty obvious, since our law employs the legal fiction that says the employer, not the actual writer, is the author from the very moment of creation in work made for hire situations. So we should read these claims, when we find them in author agreements, as pretty direct assaults on an author's ability to comply with an open access policy, no matter how much she may want to.

As disturbing as the Oxford agreement is, however, it should be said that it makes some legal sense. When a work is created by an independent contractor (and it is not clear to me if an academic author should be defined that way), there are only selected types of works that can even be considered work made for hire; one of them is "contribution[s] to a collective work." So a chapter in an edited book is at

least plausible as a work made for hire, although the other requirement — an explicit agreement, which some courts have said must predate the creation of the work — may still not be met. In any case, the situation is much worse with the publication agreement from the American Society of Mechanical Engineers (ASME), which was recently brought to my attention.

ASME takes as its motto the phrase “Setting the Standard,” and with [this publication agreement](#) they may well set the standard for contemptuous maltreatment of their authors, many of whom are undoubtedly also members of the society. A couple of points should be noted here. First, the contract does claim that the works in question were prepared as work made for hire. It attempts to “back date” this claim by beginning with an “acknowledgement” that the paper was “specially ordered and commissioned as a work made for hire and, accordingly, ASME is the author of the Paper.” This acknowledgement is almost certainly untrue in many, if not most, cases, especially since it appears to apply even to conference presentations, which are most certainly not “specially commissioned.” The legal fiction behind work made for hire has been pushed into the realm of pure fantasy here.

What’s more, later in the agreement the “author” agrees to waive all moral rights, which means that they surrender the right to be attributed as the author of the paper and to protect its integrity. Basically, an author who is foolish enough to sign this agreement has no relationship at all to the work, once the agreement is in place. They are given back a very limited set of permissions to use the work internally within their organization and to create some, but not all, forms of derivative works from it (they cannot produce or allow a translation, for example). Apparently ASME has recently started to disallow some students who publish with them to use the published paper as part of a dissertation, since most dissertations are now online and ASME does not permit the writer to deposit the article, even in such revised form, in an open repository.

To me, this agreement is the epitome of disrespect for scholarly authors. Your job, authors are told, is not to spread knowledge, not to teach, not to be part of a wider scholarly conversation. It is to produce content for us, which we will own and you will have nothing to say about. You are, as nearly as possible, just “chopped liver.” It is mind-boggling to me that any self-respecting author would sign this blatant slap in their own face, and that a member-based organization could get away with demanding it. The best explanation I can think of is that most people do not read the agreements they sign. But authors — they are authors, darn it, in spite of the work for hire fiction — deserve more respect from publishers who rely on them for content (*free* content, in fact; the ASME agreement is explicit that writers are paid nothing and are responsible for their own expenses related to the paper). Indeed, authors should have more respect for themselves, and for the traditions of academic freedom, than to agree to this outlandish publication contract.

# A distinction without a difference

*Fri, 29 May 2015 09:38:19, ksmithl2@duke.edu, [category: authors-rights, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

The discussion of the new Elsevier policies about sharing and open access has continued at a brisk pace, as anyone following the lists, blogs and Twitter feeds will know. On one of the most active lists, Elsevier officials have been regular contributors, trying to calm fears and offering rationales, often specious, for their new policy. If one of the stated reasons for their change was to make the policy simpler, the evidence of all these many “clarifying” statements indicates that it is already a dismal failure.

As I read one of the most recent messages from Dr. Alicia Wise of Elsevier, one key aspect of the new policy documents finally sunk in for me, and when I fully realized what Elsevier was doing, and what they clearly thought would be a welcome concession to the academics who create the content from which they make billions, my jaw dropped in amazement.

It appears that Elsevier is making a distinction between an author’s personal website or blog and the repository at the institution where that author works. Authors are, I think, able to post final manuscripts to the former for public access, but posting to the latter must be restricted only to internal users for the duration of the newly-imposed embargo periods. In the four column chart that was included in their original announcement, this disparate treatment of repositories and other sites is illustrated in the “After Acceptance” column, where it says that “author manuscripts can be shared... [o]n personal websites or blogs,” but that sharing must be done “privately” on institutional repositories. I think I missed this at first because the chart is so difficult to understand; it must be read from left to right and understood as cumulative, since by themselves the columns are incomplete and confusing. But, in their publicity campaign around these new rules, Elsevier is placing a lot of weight on this distinction.

In a way, I guess this situation is a little better than what I thought when I first saw the policy. But really, I think I must have missed the distinction at first because it was so improbable that Elsevier would really try to treat individual websites and IRs differently. Now that I fully understand that intention, it provides clear evidence of just how out of touch with the real conditions of academic work Elsevier has become.

Questions abound. Many scientists, for example, maintain lab websites, and their personal profiles are often subordinate to those sites. Articles are most often linked, in these situations, from the main lab website. Is this a personal website? Given the distinction Elsevier makes, I think it must be, but it is indicative of the fact that the real world does not conform to Elsevier’s attempt to make a simple distinction between “the Internet we think is OK” and “the Internet we are still afraid of.”

By the way, since the new policy allows authors to replace pre-prints on ArXiv and RePEC — those two are specifically mentioned — with final author manuscripts, it is even clearer to see that this new policy is a direct attack on repositories, as the Chronicle of Higher Education perceives [in this article](#). Elsevier seems to want to broaden its ongoing attack on repositories, shifting from a focus on just those campuses that have an open access policy to now inhibiting green self-archiving on all university campuses. But they are doing so using a distinction that ultimately makes no sense.

That distinction gets really messy when we try to apply it to the actual conditions of campus IT, something Elsevier apparently knows little about and did not consider as she wrote the new policy documents. I am reminded that, in a conversation unrelated to the Elsevier policy change, a librarian told me recently that her campus Counsel’s Office had told her that she should treat the repository as an

extension of faculty members' personal sites. Even before it was enshrined by Elsevier, this was clearly a distinction without a difference.

For one thing, when we consider how users access these copies of final authors' manuscripts, the line between a personal website and a repository vanishes entirely. In both cases the manuscript would reside on the same servers, or, at least, in the same "cloud." And our analytics tell us that most people find our repositories through an Internet search engine; they do not go through the "front door" of repository software. The result is that a manuscript will be found just as easily, in the same manner and by the same potential users, if it is on a personal website or in an institutional repository. A Google or Google Scholar search will still find the free copy, so trying to wall off institutional repositories is a truly foolish and futile move.

For many of our campuses, this effort becomes even more problematic as we adopt software that helps faculty members create and populate standardized web profiles. With this software — VIVO and Elements are examples that are becoming quite common — the open access copies that are presented on a faculty author's individual profile page actually "reside" in the repository. Elsevier apparently views these two "places" — the repository and the faculty web site — as if they really were different rooms in a building, and they could control access to one while making the other open to the public. But that is simply not how the Internet works. After 30 years of experience with hypertext, and with all the money at their disposal, one would think that Elsevier should have gained a better grasp on the technological conditions that prevail on the campuses where the content they publish is created and disseminated. But this policy seems written to facilitate feel-good press releases while still keeping the affordances of the Internet at bay, rather than to provide practical guidelines or address any of the actual needs of researchers.

# This is a solution?

*Thu, 11 Jun 2015 07:22:17, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: orphan-works]*

Ever since it appeared, I knew I should write about this new [report concerning orphan works](#) that the Copyright Office issued earlier this month. But, to be honest, I have been on vacation, and have not had a chance to read the full report yet, only excerpts. Fortunately, on Monday Mike Masnick from Techdirt [posted about the report](#) and absolutely nailed it. So I have little to add, and simply want to direct readers to Mike's post.

As Mike observes, the new CO report would mostly make a serious problem worse, in that it would make the use of orphan works more difficult rather than less. The idea of creating a registry for users to register their proposed use is positively Kafkaesque; the real need is to be able to better identify rights holders, not users. So why not provide incentives for rights holders to register, rather than creating a new registry that will probably not be used, since it is so counter-intuitive and will be unknown to the vast majority of putative users?

The Techdirt post correctly notes that the problem of orphan works increased exponentially after the U.S. made two changes in its law — the elimination of formalities and the extension of the copyright term of protect to life plus 70 years. These changes were made because the U.S. joined the Berne Convention and other international treaties on copyright in the 1980s, so reversing them would be very difficult. Still, the problem is world-wide, so maybe someday sanity will prevail at the WIPO and these issues will be addressed directly, instead of taking a kind of backwards approach that tries to solve a problem without addressing its root causes, which has the result of making things worse. See the suggestions I made several years ago for solving the “Berne Problem” [here](#) and [here](#).

The most troubling aspect of the Copyright Office's new report is the disdain with which it treats fair use. The U.S. is actually in a better position as far as uses of orphan works are concerned than most nations because our judges were wise enough to create this doctrine over 150 years ago. But today's Copyright Office thinks it knows better; it believes that fair use is “of limited utility” in solving the orphan works problem. Instead, we need more bureaucratic apparatus. Worse, to get to this position, the CO presents the HathiTrust case, with its strong affirmation of fair use, as being about “the digitization of millions of non-orphaned works” (p.42). This is ridiculous, of course; the HathiTrust corpus contains both orphan works and works for which rights holders can be identified. The CO seems to take the position that since specific uses of orphan works were not ultimately adjudicated in the HathiTrust case, that case is not relevant to the application of fair use to the orphan works problem. So although the report does recommend that any legislative “solution” to the orphan works problem should preserve the users' ability to rely on fair use, the CO does not seem to feel that fair use is very helpful. But that simply reflects the prejudice that the CO has about fair use, a prejudice that makes them an unreliable guide to copyright law in the U.S.



# An international perspective on statutory damages

Thu, 02 Jul 2015 07:00:22, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip]

It has been a long time since we discussed statutory damages in this space. Statutory damages are, of course, the high monetary damages that rights holders can elect when they sue someone for infringement. Instead of having to prove the actual harm they suffered, statutory damages presume that harm and make proving it unnecessary. In the U.S., statutory damages can be as high as \$150,000 per infringing act (see 17 U.S. Code section 504(c)). This is a number that the content industries love to throw around, especially as part of the highly-fictionalized warning you see at the beginning of DVDs.

Back in 2009, when the recording industry was actively suing its own customers for copyright infringement because of file-sharing, statutory damages were briefly a hot topic after juries returned million-dollar verdicts against ordinary individuals for downloading files the actual value of which was less than \$100. At the time I [wrote about this issue](#), and also linked to another lawyer's [blog post which argued that these statutory damages were likely unconstitutional](#). Since the RIAA has taken its campaign for ever-stronger copyright enforcement and ever-steeper penalties in a different direction, there has been less conversation about these disproportionate penalties.

This week, however, a development in Europe has reminded me that we should not let this issue drop. Last week Poland's Constitutional Court released a [ruling which effectively declares Poland's own take on statutory damages a violation of the Polish Constitution](#). Polish law, it seems, enacts the same policy of allowing increased damages, well beyond ordinary judicial remedies, for copyright infringement with a provision that allows tripling of the "respective remuneration that would have been due at the time of claiming it in exchange for the rights holder's consent for the use of the work" (see Article 79 of the [English translation of Poland's copyright law here, on the WIPO site](#)). What this essentially says is that triple the actual harm done (the amount the rights holder would have been due) can be awarded as a form of statutory damages. And the Polish Constitutional Court has now decided that that provision must be changed because it violates a constitutional provision ensuring equality of protection for property ownership. It seems they are concerned that the Polish copyright law gives a level of protection to copyrighted property that is much greater than other forms of property.

It is interesting to compare this situation to what we find in U.S. law. We do not, of course, have the same provision about equal protection for copyright ownership in our Constitution. The Constitutional case against statutory damages is made more on the grounds of due process, where the damages are so in excess of the harm that they are unreasonable, out of proportion, and unfair to defendants. Still, there is intuitive sense to the idea that copyrighted works are protected far more comprehensively and stringently than most other kinds of property. If this is true in Poland, and the Polish Court thinks it is, it is certainly even more the case in the U.S.

Consider two points. First, in the Jamie Thomas file sharing case, the relationship between the actual harm — it would have cost about \$24 for her to buy the songs at issue — and the 1.9 million dollar verdict against her, was much more disproportional than the triple damages that concerned the Polish court. If a factor of 3 was too much for the Polish court to accept, a multiplier of nearly 800,000 ought to shock every U.S. court and every U.S. citizen. Second, it is important to notice the different types of parties involved in the Polish case; it involved a cable TV network that apparently rebroadcast some

films without a license. So corporate entities were involved, and the Polish Court still felt that tripling the damages was unfair. Yet in the U.S. we have allow grossly more disproportionate damages to be awarded against private citizens.

The content industry often looks to Europe and to other international laws and agreements they can use to convince U.S. lawmakers to increase protection for copyrighted works. Here we have an international court pointing the other way; showing us in the U.S. how out of whack our copyright law has become in the area of statutory damages. Something tells me this will not be an example cited by the MPAA or the U.S. Trade Representative. But as Congress and the Copyright Office discusses reforming the copyright law, this finding from the Constitutional Court of Poland should shame us into looking at statutory damages here in America and recognizing that this is a problem in desperate need of remedy.

# Can this gulf be bridged?

*Wed, 15 Jul 2015 05:44:07, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]*

Litigants in court cases often disagree sharply about the law and its application to the facts, so it is probably not a surprise that the briefs filed in the District Court's re-examination of its ruling in the Georgia State copyright infringement trial should see the issues in such starkly different terms.

If you read the publishers' brief, the 11th Circuit decision that sent the case back to the District Court changed everything, and every one of those 70 excerpts found to be fair use at trial now must be labeled infringement. This is absurd, of course, and I don't actually believe that the publishers expect, or even hope, to win the point. They want a new ruling that they can appeal. In my opinion the publisher strategy has now shifted from an effort to "win" the case, as they understand what winning would mean, to a determination to keep it going, in order to profit from ongoing uncertainty in the academic community (and, possibly, to spend so much money that GSU is forced to give up).

On the other hand, the brief from Georgia State, filed last Friday, argues that all 70 of those challenged excerpts are still fair use. It seems likely that the actual outcome will be somewhere in the middle, and, to be fair to them, GSU does recognize this, by making a concession the publishers never make. For a number of excerpts where a digital license was shown to be available at the time of the trial, GSU argues that the available licenses were not "reasonable" because they force students to pay based on what they are getting access to, whether or not the specific excerpt is ever actually used. This is an interesting argument, tracking a long-standing complaint in academic libraries. If the court accepts it, it would dramatically restructure the licensing market. But GSU also seems to recognize that this is a stretch, and ends several of its analyses of specific excerpts by saying that the specific use "should be found to be fair if the Court finds the licensing scheme unreasonable, and unfair if the Court finds the licensing scheme reasonable." So it seems GSU is prepared for what I believe is the most likely outcome of this reconsideration on remand — a split between fair uses and ones that are not fair that is different than the original finding — probably with some more instances of infringement — but still a "split decision."

The availability of licenses is one of the interesting issues in these briefs. The publisher plaintiffs now argue that licenses were available, back in 2009, for those excerpts where the judge said no licenses were "reasonably available." They are continuing to try to introduce new evidence to this effect; which is something GSU vigorously opposes. But those of us who have been involved in e-reserves for a while remember clearly that such licenses were not available at all through the CCC from Cambridge University Press and only occasionally from Oxford. So what is this new evidence (which the publishers' brief says was not offered before because they were so surprised that it was being requested)? It is an affidavit from a VP at the CCC, and my best guess is that it would argue that licenses were "reasonably available" because it was possible, through the CCC system, to send a direct request to the publisher in those instances where standard licenses for digital excerpts were not offered. GSU argues that the evidence gathering phase of the case is over, a ruling about licenses has been made and affirmed by the Court of Appeals, and the issue settled. A lot will depend on how Judge Evans views this issue; so far she has ruled against admitting new evidence.

Another controversy, about which I wrote before, involves whose incentive is at stake. The Court of Appeals wrote a lengthy discussion of the incentive for authors to write, and its importance for the fundamental purpose of copyright. To this they appended an odd sentence that says they are "primarily

concerned... with [publisher's] incentive to publish." The publishers, of course, hang a lot of weight on this phrase, and take it out of context to do so. GSU, on their side, make a rather forced argument intended to limit the impact of the sentence. Neither side can admit what I believe is the truth here: that that one sentence was inserted into an opinion where it does not fit because doing so was a condition of the dissenting judge for keeping his opinion as a "special concurrence" rather than the dissent it really was. If I am right, this compromise served the publishers well, since they can now cite the phrase from the actual opinion of the Court; it is seldom useful to cite a dissent, after all. So the publishers quote this phrase repeatedly and use it to argue that all of the factors really collapse into the fourth factor, and that any impact at all, no matter how small, on their markets or potential markets effectively eliminates fair use. Authors, and the reasons that academic authors write books and articles, do not appear in the publishers' analysis, as, indeed, they could not if the argument for publisher hegemony over scholarship is to be maintained.

GSU, as we have already seen, takes a more balanced approach. For the first factor, they discount the publishers' attempt to make "market substitution" a touchstone even at that point in the analysis, and focus instead on the 11th Circuit's affirmation that non-profit educational use favors fair use even when transformation is not found. The GSU brief fleshes this out nicely by discussing the purpose of copyright in relationship to scholarship and teaching. On the second factor, GSU discusses author incentives directly, which in my opinion is the core of the second factor, even though courts seldom recognize this. GSU also points out that the publishers have ignored the 11th Circuit's instruction, both here and in the third factor analysis, to apply a case-by-case inquiry to those factors; instead, the publishers assert that since every book contains *some* authorial opinion, the second factor always disfavors fair use, and that no amount is small enough to overcome the possibility of "market substitution." For their part, GSU introduces, albeit briefly, a discussion of the content of each excerpt (they are often surveys or summaries of research) for the discussion of factor two, and of the reason the specific amount was assigned, in regard to factor three.

As I said, these differences in approach lead to wildly different conclusions. Consider these paragraphs by which each side sums up its fair use analysis for each of the excerpts at issue:

The publishers end nearly every discussion of a specific passage with these words — "On remand, the Court should find no fair use as to this work because: (1) factor one favors fair use only slightly given the nontransformativeness of the use; (2) factor two favors Plaintiffs, given the evaluative/analytical nature of the material copied; (3) factor three favors Plaintiffs because even assuming narrow tailoring to Professor \_\_\_\_\_'s pedagogical purpose, it is counterbalanced by the threat of market substitution, especially in light of the repeated use; and (4) factor four "strongly favors Plaintiffs," and is entitled to "relatively great weight," which tips the balance as to this work decidedly against fair use. "

On the other side, GSU closes many discussions (although there is more diversity in their analysis and their summations than in the publishers') this way — "Given the teaching purpose of the use, the nature of the work and the decidedly small amount used, the fact that this use did not supplant sales of the work, and the lack of digital licensing, the use of this narrowly tailored excerpt constituted fair use."

These are starkly contrasting visions of what is happening with these excerpts and with electronic reserves, as practiced at a great many universities, as a whole. It will be interesting, to say the least, to see how Judge Evans decides between such divergent views.

# What is “extended” about Extended Collective Licensing?

*Tue, 04 Aug 2015 07:33:26, ksmith12@duke.edu, [category: copyright-issues-and-legislation, category: licensing, category: orphan-works]*

There has been a lot of discussion recently about the new proposals sent out for comment by the Copyright Office about [orphan works and mass digitization](#), and numerous library groups are drafting responses to the Notices of Inquiry as I write. Part of what the CO proposes in regard to mass digitization is an “[extended collective licensing](#)” scheme, which prompts the question in my title.

Before turning to that, however, let’s look a moment at the whole picture of what the CO is suggesting here. The proposals address the overall problem of orphan works. Unfortunately they do not do so by taking steps to reduce the number of orphan works or to make finding rights holders easier. Instead, they create significant new obstacles for users who want to make use of an orphan work. If you are looking to use just one or two works for which a rights holder cannot be determined, the CO wants you to go through a poorly-defined process of making a “reasonably diligent” search AND they will insist that you register your use. If this seems backwards, that is because it is. The goal here seems to be to discourage use, and hence new creation, by placing the onus on the user rather than the rights holder to make themselves known. The excuse for such lousy policy would probably be the prohibition of formalities in the Berne Convention, but other countries have adopted [voluntary registries for rights holders](#). Our Copyright Office, however, has been blinded by staring into the brilliance of Hollywood for so long, and can only see copyright on their terms. Hence the necessity of burdening users who, we know, are significant threats to the “creativity” of the music and movie companies.

Alongside this proposal for how to deter use of individual orphan works is a grander scheme to deter mass digitization projects, called extended collective licensing. So what does “extended” mean in this context? A normal collective licensing scheme means that rights holders get together and create a collective organization to administer the rights that they own. Such organizations are [usually inefficient and sometimes prone to corruption](#), but there is nothing inherently wrong with the idea behind them. They could, if done well, increase efficiency for both rights holders and users (that is, for new creators). When a collective licensing scheme is extended, however, it means that licenses are being sold for rights not held by any of the members of the collective society. That is the point about orphan works — a collective society representing the traditional content industries would sell licenses for the use of works for which they do not, by definition, hold the rights. They would collect licensing fees “on behalf” of the unknown owners. According to the proposed pilot, such a collecting agency would have an obligation to look for the correct rights holders in materials for which they collect fees, but there is no indication of how they would do this and no indication that a significant success rate could be achieved. After a certain period of time, of course, the money collected would belong to the usual suspects; they would reap where they did not sow.

So what does “extended” really mean here? If the situation were reversed, the content industries themselves would have a perfect word for it. They would call it theft, or piracy. Traditional rights holders love to use analogies with real property, claiming, ad nauseum, that downloading an unlicensed movie is equivalent to driving off in someone else’s car. Now they are proposing, through the Copyright Office, to sell other peoples’ property for their own benefit. Wouldn’t the “extended” analogy then be me trying to sell a car parked in front of my house, just because I do not know who the owner is? It

seems that in this context, “extended” just means parasitic — claiming a unjust and undeserved benefit from someone else’s labor.

Economists, of course, have less harsh, but no less pejorative, terms for this sort of arrangement. One is “rent seeking,” which refers to efforts to gain a profit without making any reciprocal contribution to society by creating value. When a company records and distributes a song or an album, and collects money for it, that is a normal economic exchange — value for value. But when Warner Music Group continues to collect fees for the use of “Happy Birthday to You” long after any incentive for creativity is being fostered and, apparently, long after the rights have been abandoned, that is pure rent seeking — the pursuit of an undeserved profit without a normal exchange of value. ECL is a similar exercise in rent-seeking, asking, that is, to benefit from the labors of unknown others without the obligation to provide value in exchange.

Another economic term is relevant here — deadweight loss. Taxation is often held to be responsible for deadweight loss, when, because of taxes, it becomes too expensive to make or sell some good. In that situation, the manufacture will stop making the good, and society will lose all the potential benefits — no goods and no tax revenue. Deadweight loss. In the case of extended collective licensing, the risk of deadweight loss, and the analogy to a tax, is the same. ECL is a form of tax on using orphan works. The revenue from that tax will have no benefit in providing an incentive for further creation, because it will not go to the creators who made the works in the first place. But a requirement to pay such an unproductive tax will certainly deter many digitization projects that could make rare historic materials available for research, study and teaching. Thus productivity is lost without the benefits of an economic incentive. It is, truly, a lose-lose situation.

# What happens when there is no publication agreement?

*Mon, 10 Aug 2015 14:22:07, ksmith12@duke.edu, [category: authors-rights, category: copyright-issues-and-legislation, category: licensing, category: scholarly-publishing]*

Scholarly communication discussions and debates usually focus, quite obviously, on the terms of publication agreements and the licenses those agreements often give back to authors to use their own work in limited and specific ways. This is such a common situation that it is hard to realize that it is not universal for scholarly authors. But recently it has come to my attention that some authors actually never sign any agreement at all with their publishers, and in one situation that I will explain in a moment, that led to a dispute with the publisher about whether or not the author could place her article in an institutional repository. The issue, broadly speaking, is when an implied license can be formed and what such licenses might permit.

In a couple of [previous posts](#), I have discussed the idea of implied licenses: licenses that are formed without an explicit signature, usually because someone takes an action in response to a contractual offer, and the action is clear enough to manifest acceptance of that offer. One of the most common implied licenses that we encounter [underlies the transaction every time we open a web page](#). Our browsers make a copy of the web page code, of course, and that copy implicates copyright. But our [courts have held](#) that when someone makes a web page accessible, they are offering an implied license that authorizes the copying necessary to view that webpage. No need to contact the rights holder each time you want to view the page, and no cause of action for infringement based simply on the fact that someone viewed a page and therefore copied the code, temporarily, in their browser cache.

It is important to recognize that such licenses are quite limited. An implied license can, at best, be relied upon when doing the obvious acts that must have been anticipated by the offeror, such as viewing a web page. An implied license would not, for example, authorize copying images from that website into a presentation or brochure; that would be well beyond the scope of a license implied by merely making the site available. For those sorts of activities, either permission (an explicit license) or an exception in the copyright law would be needed.

So how might implied licensing help us untangle the situation where an author has submitted her work to a journal, and the journal has published it without obtaining an explicit transfer of right or a license? As I said, this is a reversal of the normal situation, and it caught me by surprise. But I have heard of it now from three different authors, all publishing in small, specialized journals in the humanities or social sciences.

The way the question came to me most recently was from an author who had published in a small journal and later asked, because she had no documentation that answered the question, if she could deposit her article in an open repository. The publisher told her that she could do so only after obtaining permission from the Copyright Clearance Center, and she came to me, through a colleague, asking how the publisher could insist on her getting permission if she had not signed a transfer document. Could the publisher, she asked, claim that the transfer had taken place through some kind of implied contract?

The answer here is clearly no; the copyright law says explicitly, in [section 204](#), that “A transfer of copyright ownership... is not valid unless an instrument of conveyance, or a note or memorandum of the

transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." So an implied transfer of rights is impossible; all that can be conveyed implicitly is a non-exclusive license (as in the web site example).

In the case of my author with no publication agreement, she remains the copyright holder, whatever the publisher may think. At best, she has given the publisher a non-exclusive license, by implication from her act of submitting the article, to publish and distribute it in the journal. This is not really all that unusual. I have written opinion pieces for several newspapers in the past and never signed a copyright transfer; the pressure of daily publication apparently leads newspapers to rely on this kind of implied license quite frequently. But it is unusual in academia, and requires some unpacking. No transfer of copyright could have occurred by implication, so the rights remain with the author, who is free to do whatever she likes with the article and to authorize others to do things as well. The publisher probably does have an implied license for publication, but that license is non-exclusive and quite limited.

As we worked through this situation, three unanswered questions occurred to me, and I will close by offering them for consideration:

1. Are authors always correct when they tell us they did not sign a publication agreement? Sometimes an agreement may have been forgotten amidst all the paperwork of academic life, or the agreement might have been online, a "click-through" contract at the point of submission. We need to probe these possibilities when confronted with the claim that no agreement was signed, but those are very delicate conversations to have.
2. Returning for a moment to the possibility of a click-through agreement that the author could have forgotten, we might also ask if this type of arrangement, increasingly common among academic publishers, are really valid to transfer copyright. I am well aware that courts are becoming quite liberal in accepting online signatures and the like, but is there a limit? Where there is a statute that explicitly requires a signed writing for a specified effect, as the Title 17 does for assignment of copyright, could an author challenge the sufficiency of a (non-negotiable) click-through agreement? I expect that this issue will eventually come before a court (if any readers who know of such cases, please add the information in the comments), and I will be very interested in that discussion.
3. Finally, what do we make of the journal's claim, in the situation I was asked about, that the author must purchase permission to use her own work from the Copyright Clearance Center? If there was no transfer of rights, the journal has no right to make such a demand and the CCC has no right to sell a license. This is one more situation where it seems that the CCC is sometimes used to sell rights that are not actually held by the putative licensors, and it renews my concern about whether, and when, we actually are getting value for the money we spend on licensing.



# Conspiracy theories, copyright term, and the TPP

*Mon, 17 Aug 2015 11:13:26, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: international-ip, category: public-domain]*

I try to resist the urge to find conspiracies behind political developments; I tell myself that politicians and bureaucrats are just too unorganized and divided to really conspire about much of anything. But sometimes that conviction gets tested.

Consider this: under our current, very confusing, set of rules for copyright term, at least some published works will begin entering the public domain in 2019. No published works have been rising into the public domain for a long time in the U.S., but a work published in the U.S. in 1923, which had its term extended to 95 years from publication by the 1976 Copyright Act, would enter the public domain on Jan. 1, 2019, since 1923 + 95 equals 2018, and for administrative simplicity, works become PD on the first day of the year after their term expires (hence January 1 is celebrated as Public Domain Day). Many works are protected for even longer, but this is the earliest we could hope to see published works entering the U.S. public domain. And because this date is drawing near, it probably will not surprise many, including those who have always believed that protecting Mickey Mouse lies behind the U.S. term of protection, that Congress is once again beginning the process of formulating a new copyright act. Do we really have any doubts that an extended term will be high on the wish list of the entertainment industry lobbyists?

But — and here is the conspiracy part — in case term extension can't get through Congress, or cannot get through fast enough (the last copyright revision took over 20 years), there is an alternative approach to punitively protecting valuable icons from the mid-twentieth century — the Trans-Pacific Partnership agreement.

The TPP, as many readers will know, is a massive free trade agreement being negotiated in secret (more or less) between the U.S and eleven other countries. Included in the TPP is a chapter on intellectual property, and [leaks of the text of that chapter](#) have shown us that negotiators are considering binding the 12 parties to a copyright term that might significantly exceed, possibly even double, the minimum requirement under the Berne Convention of life of the author plus 50 years. The longest term being proposed in the TPP, and the negotiators do not seem to have agreed on this point yet, is life plus 100 years.

Back in June, Congress [renewed so-called fast track authority for the President](#) over trade agreements, so no matter what is in the final version of the TPP, Congress will not get to amend the provisions; they will have to vote either yes or no on the text as it comes from the hands of the negotiators. Obviously this gives a great deal more influence to the lobbyists, who must work only with the very friendly folks from the U.S Trade Representative's office, not with the splintered and demanding Congress. So perhaps this is a backdoor way to protect Mickey well into the 21st century.

We should note, however, that trade agreements are generally not “self-executing,” meaning that they do not become law automatically even once they are ratified. Each nation must still make changes to their own national laws to bring them in line with the negotiated requirements. So if a TPP with a copyright term requirement of life plus 100 years did emerge, Congress would still have to act to make that part of U.S. law. But it would obviously be much easier to get Congress to do so if it were a requirement of a ratified trade agreement; that is great platform on which the lobbyists can stand.

Krista Cox from the Association of Research Libraries has done a [wonderful analysis of the latest leaked IP chapter from the TPP](#), which is worth reading by anyone interested in these issues. For me, there are three important points to take away from Krista's analysis. First, the current version of the IP chapter is an improvement in several ways over what we had seen before. Second, there is still significant cause for concern in two areas — the proposal to make the issue of technological protection measures independent of the underlying copyright rules regarding a work and the issue discussed above — the potential for a much-extended copyright term to emerge from the negotiation. And, finally, there is cause for real disappointment, if not much surprise, at the fact that the U.S. is one of only two countries that is apparently opposing a very innocuous provision that acknowledges the importance of the public domain.

With this final point we seem to come full circle. The U.S., for which the public domain is a Constitutionally-required aspect of our copyright law, opposes an acknowledgement of the importance of that gesture to the public interest. How can this be? I am afraid it reminds us again that the folks responsible for copyright policy in our government do not much like the idea that copyright is a bargain with the public. Rather than listening to the Constitution or to the 225 years of experience of copyright in this country, those officials turn their ears exclusively to the needs and concerns of the legacy entertainment and publishing industries. They seem to hear only the siren song of the lobbyist, and indeed, to move freely in and out of the ranks of those lobbyists. Perhaps that is the conspiracy I would rather not believe in, a conspiracy to cut the public, and the public interest, out of their discussions about how copyright should work.

# Defining derivatives

Mon, 24 Aug 2015 15:14:34, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: licensing]

It is frequently interesting, and sometimes appalling, to see how a court that does not usually deal with copyright issues reacts when confronted with one. Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia is certainly not a complete novice regarding copyright, but the issue she confronted in *Drauglis V. Kappa Map Group* must certainly have been a new one for her. It is a case involving the scope and interpretation of a Creative Commons license, and Judge Jackson deals quite well with it, in my opinion, in a [decision issued last week](#). But she is drawing lines in this case that I am quite sure will be discussed and readjusted over the next few years.

The facts in the case pose a situation that anyone familiar with CC licensing could probably have seen coming. Art Drauglis, the plaintiff, took a quite lovely photograph of a scene in rural Maryland that he calls “Swain’s Lock.” There is no indication that Drauglis is a professional photographer, and he uploaded the image to a Flickr account he shares with his wife, using a CC Attribution Share Alike license. Several years later he was upset to find that a publisher, Kappa Map Group, had used his photograph on the front cover of their Montgomery County Street Atlas, which, of course, they offered for sale. Drauglis sued alleging copyright infringement based on the commercial use, that the share alike provision of his license had been violated, and that he was not given appropriate attribution. The court dismissed all of these claims on a motion of summary judgment, in the process making some important rulings about how we should understand Creative Commons licenses.

As an initial matter, Judge Jackson cites several authorities for the general proposition that a copyright holder who licenses his or her work can only sue for copyright infringement if the use is outside the scope of that license. The issue of commercial reuse is an easy matter for the court, since the license Drauglis chose allows such commercial reuse. He could have chosen a non-commercial (NC) term for this photo, but did not. So the fact that Kappa Maps took the photo and used it as the cover illustration for a commercial product does not, by itself, support a claim of copyright infringement.

The lesson from this part of the story is clear; rights holders need to think carefully about the terms of the licenses they imply. Creative Commons offers a very flexible set of licenses, and those of us who use them can adjust to suit our particular needs. But we need to think through what those needs are and select the appropriate terms.

If this was an easy call, three other points raised in this decision are more complicated, and offer some insights into how we might think about some of the aspects of Creative Commons licenses.

First, Drauglis asserted that the terms of his Share Alike provision had been violated because the Atlas was not offered for free and under similar conditions. To decide this issue, Judge Jackson notes that a CC SA provision applies only to derivative works, and she then examines the definition of a derivative in section 101 of the copyright law. Noting that a derivative is defined as a work that is “based upon” a preexisting work and that modifications appear to be required, the judge determines that simply reprinting the photo as the cover illustration of a map book does not create a derivative work. Instead, she considers the atlas to be a compilation, which is treated quite differently in our copyright law.

In general I think this aspect of the case raises a distinction that many users of CC licenses and CC licensed material do not think about — the fact that a share alike provision applies only to derivative

works, and not all uses would qualify as derivatives. The reason I think this will be a matter for future debate is because the line is not very clear. If I use a preexisting image as an illustration for a web page I create, at what point does that use result in a derivative work? If the image is reproduced in its entirety and not changed, but merely surrounded by the other parts of the site, it sounds from this decision like the website might be a compilation of sorts, and the SA provision would not come into play.

One thing that is clear, and this is my second point, is that a Share Alike provision does not require that the second work be made available for free, as long as a derivative is not created. The compilation atlas containing Drauglis' photo was sold, of course, and the court said that was OK because there was no non-commercial restriction on the license and the commercial work was not a derivative (which would activate the share alike restriction). This was an important issue for me when I was deciding which CC license to use for [my book that was published last year](#). I considered a CC-BY-SA license in the mistaken belief that this would prevent commercial exploitation of the book without my explicit consent, something I wanted to prevent in order to protect the publisher. My colleague Paolo Mangiafico corrected my thinking on this point, pointing out that someone could, conceivably, download the book and sell unmodified copies without violating the SA provision. In this Paolo correctly anticipated the district court, and his argument convinced me to use an attribution/non-commercial license. Thus non-commercial derivatives are allowed, which was important to me, but all commercial uses other than by the ACRL, who published the book, would require my additional permission.

The third aspect of the case that I think will generate ongoing discussion is the small controversy about appropriate attribution. This is an issue that I hear about frequently from users of CC-licensed material, who want to do the right thing. In the case against Kappa Map Group, Drauglis argued that the credit given for his photo, on the outside of the back cover of the Atlas, was inadequate and conflicted with the general statement claiming copyright in the work as a whole that was inside of the front cover. To decide this issue the judge looked at how copyright notices for the individual maps were handled and what the general standards for appropriate attribution were, and concluded that Kappa had behaved correctly. This aspect of the case offers a clear lesson for other users of CC licenses. It is long established that works can have multiple copyright statements, and an assertion of copyright in an overall work does not negate attribution and assertion of rights for incorporated material as long as that attribution is given in a manner appropriate to the medium and the work. So I think the messages for users of CC-licensed materials from this part of the decision is to relax, give attribution in the best way appropriate to the new work, and not worry too much about the fact that a new work may have multiple attributions and copyright statements.

There is additional analysis and discussion of this case [over at TechDirt](#). To me the bottom line is that Kappa Map Group behaved responsibly and Mr. Drauglis, suffering from licensor's remorse, tried to use the courts to remedy his own mistaken selection of a license. Nevertheless, whether this case is finished or not, I think we will hear more about what the boundaries of a derivative work really are.

# Ignore fair use at your peril!

*Mon, 14 Sep 2015 13:27:14, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: user-generated-content]*

One could be forgiven for thinking of the [“Dancing Baby” case](#) as a thing of the past. It seems a long time ago that a district court affirmed that the music heard in the background (for only 29 seconds) of a video in which Stephanie Lenz’s baby is dancing — the music was Prince’s “Let’s Go Crazy” — was fair use, and told Universal Music that they were required to consider fair use before sending out take down notices under authority of the DMCA. The video, after all, was posted in 2007. Lenz sued Universal, arguing that, because they failed to consider even an obvious example of fair use before sending a take down notice for the video to YouTube, they had committed copyright misuse under [section 512\(f\) of the Copyright Act](#) by knowingly misrepresenting the legal situation in such a notice.

There was, in fact, an initial ruling that rejected some of Universal’s attempts to exonerate itself, back in 2010. Then, in 2013, the judge rejected cross motions for summary judgment, essentially allowing the case to go forward on the misrepresentation claim. Universal appealed this dismissal, and the Ninth Circuit Court of Appeals [issued its decision today](#). The Court of Appeals affirmed the lower court ruling, agreeing that the DMCA requires rights holders to consider fair use when sending take down notices and letting the suit go forward to determine if Universal was “willfully blind” to the clear fact that Ms. Lenz’s use was authorized by the law.

The thing about the decision that I really want to bring to readers’ attention is what it says about the nature of fair use. About a year ago I wrote a [blog post about the idea that fair use was an “affirmative defense.”](#) I pointed out that many positive rights, including free speech, would manifest themselves in court as affirmative defenses, meaning that they would be asserted by a defendant to answer a complaint, but that they were still positive rights — a space for freedom of action, not merely an excuse. In its new ruling in *Lenz*, the Ninth Circuit makes this point abundantly clear, telling us that, **“Fair use is not just excused by the law, it is wholly authorized by the law.”** (p. 11 of the PDF) In fact, the court is so clear and eloquent on this point that I want to quote a whole paragraph, which is found on page 13 of the PDF and which states the situation regarding fair use and affirmative defenses much better than I did:

Universal’s sole textual argument is that fair use is not “authorized by the law” because it is an affirmative defense that excuses otherwise infringing conduct. Universal’s interpretation is incorrect as it conflates two different concepts: an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct. Supreme Court precedent squarely supports the conclusion that fair use does not fall into the latter camp: “[A]nyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

Given that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer.

So perhaps it is time to stop scaring people with this language about fair use as an affirmative defense. As courts keep telling us, fair use is a positive right, an authorized and vital part of the copyright law in the U.S. We cannot have one half of that law — exclusive rights for creators — without the other half, which is fair use and the other exceptions that protect productive uses. Without the latter, copyright would be mere protectionism, and, in all likelihood, unconstitutional.

# Photography, Fair Use and Free Speech

Wed, 23 Sep 2015 09:43:17, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use]

All of us take a bad picture now and then. You know, one of those pictures of yourself that makes you cringe every time you see it. Honestly, I don't think I have liked a picture taken of me since 1995. But most of us react mildly to a bad picture; we moan a little and move on. Raanan Katz, however, takes more dramatic action. Katz, who is a real estate developer and part-owner of the Miami Heat basketball team, has been trying to erase an unflattering picture of himself from the Internet for the past three years. As is so often the case with this kind of legal action, it has had the ironic effect (often called "the Streisand Effect") of drawing more attention to the photo than it would have received if ignored. But it is Katz's method of trying to make the picture go away that is the reason for this post; he bought the copyright in the picture and brought a lawsuit for infringement.

Those who want to know more about the history of this effort, and see the offending photograph, can read [this short story from Forbes magazine](#). But I want to focus on a couple of [specifics in the holding](#), which upheld the lower court's ruling that the use of the photography by the defendants was fair use. There are a couple of items in the Eleventh Circuit's fair use analysis that are worth attention, as well as an interesting connection with the Georgia State copyright case.

The connection with Georgia State is mostly found in the fact that the opinion in *Katz v. Google* was written by Judge Tjoflat, who also wrote the appellate opinion in *Cambridge University Press v. Georgia State*. The Judge seems to be getting more comfortable with the fair use analysis, although it is also arguable that this one was an easier case. The *GSU* opinion actually makes a cameo appearance in the *Katz* ruling; there is a footnote in which Judge Tjoflat acknowledges Katz's claim that the trial court failed to do the necessary case-by-case analysis of the challenged works, and cites to *GSU* for the proposition that such analysis is required. The Judge dismisses this, however, by finding that the magistrate whose "Report and Recommendation" was adopted by the lower court, had taken account of each of the different uses that the defendants had made of the ugly photo. He adds that "the district court was not required to write a prolix, unwieldy opinion with 25 separate sections devoted to each alleged instance of infringement." (FN 3) One can't help but read that comment as an oblique reference to the massive decision that Tjoflat and his colleagues confronted in the *GSU* case; I wonder what Judge Evans, who presumably is preparing a similarly lengthy opinion on remand, might make of that comment?

More substantively, the Eleventh Circuit ruling in *Katz* raises an interesting point about copyright in photographs. While discussing the second fair use factor, the nature of the original work, the court finds that the photograph in question is "primarily factual," a finding that supports fair use, by helping to tip that one factor, out of four, in its favor. The court explains this holding, while acknowledging that photography may require many creative decisions, this way, "The Photo, however, is merely a candid shot in a public setting, and there is no evidence in the record that Magriso, the photographer, attempted to convey ideas, emotions, or in any way influence Katz's pose, expression, or clothing." (p. 9). This language seems, to me, to suggest that copyright is somewhat weaker, or at least more susceptible to fair use, in photographs that simply attempt to record events that take place in public, as opposed to deliberately artistic photos. I wonder how news organizations and photojournalists feel about this. While it makes sense, I think, it also suggests a difficult line. If copyright is less protective for such "merely" journalistic photos, is there a point where we should not grant copyright at all, as we don't, for example, where a photograph merely "slavishly reproduc[es]" a two-dimensional public domain artwork. The question of how much originality is enough in a photograph, which by its nature is

often a record of “facts” such as the appearance of people or the external world, to meet the standard for copyright seems less easy here than it is, perhaps, for other media. But perhaps the answer is that we will protect most photographs, while recognizing that there may be a lower bar for fair use because of this particular and peculiar nature of the art form.

The other point in this ruling that I found very interesting is the analysis of the fourth factor, where the court found that Katz’s purchase of the rights and registration with the Copyright Office, entirely for the purpose of suppressing the picture, was evidence that the challenged uses did not do any harm to a cognizable market. In short, because the owner’s purpose was to prevent all use, fair use becomes more likely, since it shows there is no market, because no intent to ever license the work. This logic casts some doubt on the argument often made by rights holders that they have a right not to allow the work to be used. That is true, but it is still subject to fair uses, which by definition are not copyright infringement — they do not intrude on rights that the copyright owner actually holds. While the reasoning seems a bit difficult here, for me it is the most important point in this decision; the market harm factor clearly plays its part in the “safety valve for free speech” function that courts often assign to the whole fair use analysis. Simply put, fair use gets a boost whenever the issue before the court is this alleged right to suppress; copyright gives the rights holder a lot of power over a work, but it does not convey the right to entirely prevent protected speech, even when (especially when!) that speech is critical of, or distasteful to, the rights holder.

PS — this post was mostly written before I learned of yesterday’s ruling in the dispute over an alleged, and now quite doubtful, copyright in the song “Happy Birthday To You.” That decision is much more [widely covered](#) than the one discussed above, and, because it turns on such unique and difficult-to-establish facts, seems to have less impact on daily copyright issues than the *Katz* case does. So while I wanted to acknowledge the decision, and provide a [link to the ruling](#) for anyone interested who has not already seen it, I decided to stick with my original plan to discuss *Katz* today.



# Happy Birthday and extended collective licensing

*Thu, 15 Oct 2015 08:32:39, ksmithl2@duke.edu, [category: uncategorized]*

I had not intended to write about the case decided last month involving the claim by Warner/Chappell Music that they owned the copyright in the song “Happy Birthday To You.” I figured that it would be so widely covered that I would have little to contribute. Obviously I have changed my mind, and it is partly because of the nature of the coverage I have seen.

Consider [this story from Reuters](#), which says that the judge in the case ruled that Warner/Chappell Music does not hold a valid copyright in the song, and that that ruling puts “Happy Birthday To You” in the public domain. Unfortunately, this is only half right. [The decision is complicated and careful](#), making a number of important distinctions, as legal arguments must always do. The court held, in fact, that the tune to “Happy Birthday,” originally written for a song called “Good Morning To You,” is in the public domain. But about the lyrics to “Happy Birthday,” the court remained uncertain. Judge George King held that there is no evidence that Warner/Chappell Music ever received a valid transfer of rights in the lyric, so they are not the legitimate copyright holder, but he lacked sufficient evidence to determine the status of the lyrics with certainty. The decision lists several possible scenarios, including that the lyric is itself in the public domain, but it also acknowledges the possibility that the song is owned by someone who is either unknown or not able to be found.

In short, the lyric to “Happy Birthday to You” was found to be an orphan work, although the court didn’t put it that way. This is a scenario familiar to most folks in the library community, where we can gather some evidence about ownership of a work, but cannot arrive at a definitive conclusion about the existence of rights, or the ownership of them if they do exist. There is [a nice discussion here](#) of the problems involved in proving that one owns an older copyright, as in this case, by Laura Quilter from U. Mass Amherst. But what really interests me about the situation uncovered in this decision is how it reflects on the proposals being floated by the Copyright Office to address the orphan work problem through extended collective licensing.

The Copyright Office scheme would require users to pay a set licensing fee to a collective rights management organization (CRO) if they wanted to use a putative orphan work. The CRO would then be responsible to make reasonably diligent efforts to find a rights holder. If a rights holder was found, licensing revenue would be disbursed by the CRO. If an owner could not be found, the money would eventually be dedicated to some fund for the benefit of creative artists and, of course, to the maintenance of the CRO’s own bureaucracy.

Two things we can be sure of about this proposal. One is that it would create a bureaucracy which would inevitable take its own maintenance and support as a top priority. It is [well-documented](#) that such agencies have high overhead and pay out relatively low amounts to artists, even in situations where those artists are known or easy to identify. The second thing I think we can be sure of is that this scheme would reduce the role of fair use in mass digitization projects. Even if the scheme included a so-called savings clause for fair use, the existence of a licensing scheme, even when the purported licensor does not actually hold the rights, would chill efforts to apply fair use to many projects.

With that background in mind, what does the “Happy Birthday” decision add to our think about this ECL proposal?



First, let's think about the situation that led to the case, where Warner/Chappell music was collecting licensing fees without any valid claim of ownership in the "Happy Birthday" song. I am not asserting that Warner/Chappell Music was necessarily acting in bad faith; they had some reasons to believe they were valid rights holders, but those were dismantled in the court's opinion. Nevertheless, for many years users paid fees that we now believe were unnecessary, and fair use was badly curtailed, especially in things like documentary films, by litigation threats. This situation would be replicated under the Copyright Office's ECL plan. Users would be paying fees to a licensor that did not actually hold rights, so those fees would be a pure loss in the economic realm of copyright (although they would support the creation of an otherwise unnecessary bureaucracy). In the same way as with "Happy Birthday," the availability of a putative licensor would have a chilling effect on fair use, especially where the use would be publicly accessible, as with documentary films, in the case of "Happy Birthday," or mass digitization projects, in the case of libraries. The upshot of both situations is the same — economic loss without any real public benefit.

The second consideration we can glean from the "Happy Birthday" case is about just how hard it is to determine the rights holders for many orphan works. With all the powers of discovery and subpoena that were available to the court, it was unable to determine if the "Happy Birthday" lyrics were in the public domain, or, if they are still owned by someone, who that owner might be. In a ECL scheme this problem would exist both for users and for the CRO, and it is severe enough to render the whole plan inefficient and unworkable. If users were required to make some determinations before applying for such a license, that would increase the cost of every project without producing much in the way of useful results; many situations, as with "Happy Birthday," could require tremendous investment of resources without bearing any fruit. On the other side, the CRO would be unlikely, in similar situations, to ever actually find a rights holder to pay. Here too, lots of resources (provided by the users) could easily be wasted in fruitless quests for rights holders. And, of course, any leftover money would equally be wasted by providing for the expenses of an organization that would be unneeded and unable to fulfill its purpose.

If we take a serious look at what happened in the "Happy Birthday" case, where a putative rights holder was found to be collecting fees for something they did not own, and the actual rights situation was found to be undeterminable even after all of the discovery at the power of the court was exhausted, we should see an object lesson in what a bad idea, economically, an extended collective licensing scheme for orphan works would be. Fair use is a workable and economically much more efficient approach to digitization projects that involve orphan works.

# Google Books, Fair Use, and the Public Good

Sun, 18 Oct 2015 18:45:13, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: technologies]

*Note — thanks to several readers who pointed out that I had carelessly misspelled Judge Leval's name in my original posting. That error has now been corrected.*

On Friday the Second Circuit Court of Appeals [issued its ruling](#) in the appeal of the Authors Guild lawsuit against Google over the Google book search project. The decision was a complete vindication of the District Court's dismissal of the case, affirming fair use and rejecting all of the counterarguments offered by the Authors Guild.

As it happens, I was traveling when the decision came down, confirming a troubling tendency of the federal courts to issue important copyright opinions when I am out-of-pocket. (My wife says that it is not about me, but what sense does that make?) In any case, that slight delay allows me to benefit richly from the analyses posted by some very smart colleagues. Here are several great places to read about the decision:

From [Brandon Butler of American University](#).

From [Corynne McSherry of the Electronic Freedom Foundation](#)

From [Krista Cox of the Association of Research Libraries](#)

From [Carrie Russell at the American Library Association](#)

I want to add, or really just pull out from these previous posts, three points that I think are especially important.

First, Judge Pierre Leval, who wrote the opinion, does a nice job of drawing a line from the idea of transformative uses to the public purpose of copyright law. This is hardly surprising, since it was Judge Leval who wrote the 1990 article that coined the term transformative use and had such an influence on the Supreme Court in its 1994 decision in *Campbell v. Acuff-Rose Music*. In this ruling, Judge Leval reminds us quite forcibly that the primary beneficiary intended by copyright law is the public, through "access to knowledge" (p.13) and "expand[ed] public learning" (p. 15). Economic benefits for authors are instrumental, not the ultimate goal of the copyright monopoly. Then Judge Leval explains how this analysis of transformation serves those goals, clarifying why fair use is an essential part of copyright's fundamental purpose. He tells us that transformation is an answer to the question of how a borrowing from a copyrighted work can be justified. The court, on behalf of a rights holder, asks a user "why did you do this?" When the answer to that question is "because I wanted to make a **new** contribution to knowledge," that is a transformative purpose. And, by definition, it is a purpose that benefits the public, which justifies whatever minor loss a rights holder might suffer from the use. The second step in Judge Leval's analysis, asking if the new use is a market substitute for the original, ensures that that loss is not so great as to outweigh the benefit. Thus we have a coherent analysis that recognizes the public purpose of copyright and still respects its chosen method for accomplishing that purpose.

Another important thing we can learn from Judge Leval's opinion is about the difference between a transformative use and a derivative work. The Author's Guild (really some individual authors set up as

plaintiffs because the AG has been found to lack standing to sue in this case) argues that allowing the Google Books' search function usurps a right held by those authors to license indexing of their works. This is ridiculous on its face, of course — imagine the effect such a right would have on libraries — but the judge does a nice job of explaining why it is so wrong. The decisions rest heavily on the idea/expression dichotomy that is fundamental in copyright, and stresses that what is presented in the Google Books "snippet view" is more information about books (facts) rather than expressive content from those books. A derivative work, Judge Leval suggests, is one that represents protected aspects — the expressive content — of the original in an altered form (such as a translation or a movie script). A transformative use, on the other hand, uses information about the works, as in an index, or uses their content for a different expressive purpose, as in parody or scholarly comment. This is a difficult distinction to make, as all of us who work in copyright know all too well, and it remains to be seen if the approach outlined above will hold up or prove useful in the full range of situations. But it is a pointer toward a coherent way to understand a difficult part of the copyright balance.

As an aside, while reading the opinion in this case I was struck by how well the four fair use factors were handled, in a way that showed that the test used by Judge Leval respected all of the factors while essentially applying two basic questions — is the use transformative and does the new work create a market substitute for the original. In fact, I can suggest three specific passages that are especially exciting, I think, for the application of fair use and the issue of transformation — footnote 21 and accompanying text, which helpfully clarifies the relationship of the second fair use factor to the analysis of transformation; the full paragraph on page 33, that considers the use and misuse of the third factor; and the careful distinction of Google snippets from a case involving telephone ringtones that is found on pages 40-41. These are discussions that I think will have a significant impact on our ongoing consideration of fair use.

Finally, we should note that the Authors Guild has already [indicated its intention](#) to ask the Supreme Court to review this decision. This is a very bad idea, indicating that the AG simply does not know when to cut its losses and stop wasting the money provided by its members. The real point, however, is that the Supreme Court is not likely to take the case anyway. This is not a situation where a fundamental Constitutional issue is involved, as it was in the *Campbell* case (fair use as a protection for free expression) nor one where a fundamental point about our obligations in the international arena was at issue, as it was in the *Kirtsaeng* case about the application of first sale to works of foreign manufacture. In short, this is just a case about a greedy plaintiff who wants to be given an even bigger slice of the copyright pie, which the courts have determined repeatedly it does not deserve. This is not the sort of issue that attracts the very limited attention of the Supreme Court. In fact, reading the Court of Appeals' ruling leaves one with a sense that many of the AG's arguments were rather silly, and there is no reason to believe they would be less silly when presented to the Supreme Court in a petition for certiorari.

There are some who have argued that there is a split among the Circuit Courts of Appeal over transformative use, which is also a situation that can lead to Supreme Court review. But that split has always been predicated on the idea that other courts, especially the Ninth Circuit, have carried the idea of transformation too far and departed from the ambit of the original doctrine. The fact that it is Judge Leval, the author of that approach to fair use, who wrote this opinion, effectively undermines that claim. In short, this decision closes a circle that outlines a capacious and flexible approach to fair use. For getting us to this point, I suppose we should thank the Authors Guild for the unintentional support they have provided for a balanced copyright law in the digital age.

# Swatting three bugs at once

Tue, 01 Dec 2015 12:25:29, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: libraries]

It was warm here in North Carolina over the Thanksgiving holiday, and, like many of our neighbors, we left our doors open during the day to enjoy the pleasant breeze. The downside, however, was that while watching a football game on Sunday, I found myself swatting ineffectively at several small insects that found their way into the house in spite of our screens. I was reminded of that experience today (the weather is sadly much cooler) when a question about ILL and DVDs was forwarded to me. It seemed there were three different misapprehensions at work in the question, so I want to take this opportunity to swat these three “bugs” in one blog post (but I am absolutely not comparing any of the folks who posed this question to insects; it is just that the misunderstandings of copyright law represented therein are “pesky”). In addition to debunking these three worries, I also want to acknowledge two caveats that arose as I discussed this situation with some colleagues.

So here is the problem. A librarian is searching for a DVD of a relatively obscure foreign-language film from 1938, and concludes that she cannot obtain a copy through ILL because the professor who is requesting the film plans to show it in her classroom. The request went to a librarian list as a plea for help in finding a copy of the film to purchase because, the librarian had concluded, ILL was not an option.

As I say, I think there are three potential misapprehensions behind this conclusion that sometimes cause librarians to restrict their options for obtaining material out of a misplaced fear of copyright problems.

The first possible reason someone might be hesitant in this situation is the notion that audio/visual works cannot be loaned through ILL. It is easy to see the source of this mistake, since various A/V materials are explicitly excluded from the two provisions in section 108 of the copyright law that authorize copying for ILL (subsections d and e). But we must remember that those two subsections of section 108 are only about making *copies* for ILL; they have no impact on the issue of loaning originals. So where an original of a DVD (that is, a lawfully-made copy that is made with the direct authorization of the rights holder) is requested, ILL is perfectly OK.

Now here is one of the caveats. Many institutions decide not to loan audio/visual works because of work flow and availability issues. They may fear damage that can occur during mailing. Those are perfectly fine reasons to decline to loan a DVD, and the holding library is entitled to make such a decision. Just because the law *allows* a practice does not mean any particular person or entity is required to do it. But it is important to recognize that a decision not to loan A/V works through ILL is just that, a decision. It is not based on a legal prohibition.

The next potential misconception here is that the doctrine of first sale, which is what really does underlie all lending of originals from a U.S. library, somehow does not apply to the particular DVD in question. But first sale, found in section 109 of the copyright act, does allow the lending of any type of original of a copyright-protected work (with a narrow exception for computer software that is not relevant to this discussion). Whether it is a copy of a book, a filmstrip, a music CD, or a DVD, first sale — which is an exception to the exclusive right over distribution — allows lending of the lawfully made original. It does not matter if that loan is accomplished through ILL, or library reserve, or simply between two friends. Nor does it matter, after the Supreme Court ruling in *Kirtsaeng v. John Wiley*,

where the lawfully-made original came from; as long as it was original made with the consent of the rights holder (i.e. not a bootlegged copy) it can be loaned.

Here is a good place for my second caveat. These rules from the copyright act about ILL, lending of originals and, in a moment, classroom showings, are default rules. They are in place unless they have been changed by an agreement between individual parties. Where there is such an agreement, it is the agreement that provides the rules and restrictions for those parties, while the default rules of the copyright law apply to everyone else and in regard to any other topic or material. So if the specific DVD was obtained under a license that prohibited lending or ruled out classroom showings, that license should be obeyed. Likewise if the film is part of a licensed database. But most individual DVDs do not come with their own license. Instead, they are purchased under the default rules for distribution, performance, and lending that I am describing here.

Which brings me to the last potential misunderstanding, that a borrowed DVD cannot be used for a classroom showing. Classroom showing is allowed, as most academics know, as an exception to the exclusive right over public performance. Actually, the exception is somewhat broader than in-class performance; it allows a public performance or display of a copyrighted work in any “face-to-face teach activity” that takes place in “a classroom or similar place devoted to instruction.” So it is easy to imagine a film showing that would qualify, as part of an in-person teaching activity, even when not directly connected to a scheduled class or a regular course. More importantly, for our issue, the copy used for such a showing need only be “lawfully-made,” the same requirement as for the application of first sale, described above. There is nothing to prevent a classroom showing of a DVD that is borrowed from the library, from Redbox, from your neighbor, *or through ILL*.

This problem has given us a chance to examine three potential misunderstandings that can sometimes cause librarians to restrict their own activities unnecessarily, out of fear of copyright issues. It is easy to see how such misconceptions arise, since the law is complicated on these points. But, properly understood, the law often gives more leeway to libraries than we often realize. It is nice to have the chance to dispel these myths. Now if I could just get those bugs out of the house!

# Rebels in the Campus Bookstore

Tue, 15 Dec 2015 09:15:46, ksmithl2@duke.edu, [category: libraries, category: scholarly-publishing, category: technologies, category: uncategorized]

***A guest post by Will Cross, Director of Copyright and Digital Scholarship at North Carolina State University***

As the semester winds down most normal people are sweating through final projects, scheduling visits with family and friends, or looking forward to a well-deserved holiday break by the fire (or at least the warming glow of the new Star Wars movie). I can't stop thinking about textbooks.

Several recent events have kept this topic on my mind. First, Kevin and I are preparing to teach a class in the spring and we're currently putting the finishing touches on our assigned readings. Sitting at the breakfast table working through the syllabus, I was struck by a seemingly-unrelated comment from my wife, Kimberly, who is finishing her first semester in a doctoral program. Making her own plans for the spring, she noted "I need to decide if I'm going to renew my statistics textbook."

Readers who have been out of school for a few years might be surprised that many students like Kimberly rent, rather than purchase, their more expensive textbooks. If textbook rental companies like Chegg and College Book Renter are not familiar names, you may also be surprised by how quickly textbook prices have spiraled out of control in the past decade. Increasing at nearly triple the rate of inflation, textbook costs have outpaced rises in health care and housing prices, leaving students with an expected bill of more than \$1,200 a year.

Faced with these unsustainable costs, students like Kimberly find themselves in an arms race, seeking alternative channels to acquire textbooks while publishers work to plug leaks in their captive marketplace. Indeed, one of the largest copyright cases decided by the Supreme Court in recent years resulted from publishers' [attempt to create a "super-property" right](#) in order to quash the sale of less expensive international textbooks. The following year a casebook company [attempted something similar](#) using license provisions to strip property rights from students who "purchased" (ironically) their property law textbook.

While prices have gone up, [student spending has not always followed suit](#), with many students renting, borrowing, or pirating textbooks. Many more simply choose their courses and majors based on the costs of textbooks or delay their purchases to determine the extent to which a title is used in class, setting them back days or weeks in assigned readings. Of greatest concern, a [recent PIRG survey](#) revealed that more than 65% of students simply muddle through with no textbook, even though the majority recognized that this presented a "significant concern" for their ability to successfully complete the course. As a result, more than 10% of students fail a course each year because they simply cannot afford the book.

Textbook costs have priced many students out of equal participation in higher education and colleges and universities should regard this as social justice issue that threatens students' academic progress. Students have written powerfully about these issues on social media, using hashtags like #textbookbroke to document the burdens

created by high prices. For example, tweets from Kansas' #KUopentextbook project have [documented the harm done](#) by students' lost opportunities to travel to conferences, take unpaid internships, and

compete on equal footing in the classroom. As one student put it, “my wage shouldn’t determine my GPA.”

Closed, commercial textbooks also do significant harm to instructional design and academic freedom, forcing instructors to use one-size-fits-all books rather than diverse, tailored course materials. This issue received national attention in November when [an instructor was formally reprimanded](#) for refusing to assign a \$180 algebra book written by the chair and vice chair of his department. As SPARC’s Nicole Allen notes, the well-intentioned practice of assigning a single book for multiple sections was designed to support a strong local used-book market but in practice it often entrenches a system of static commercial works. It can also homogenize educational materials, limiting them to publisher-approved narratives that inhibit an instructor’s ability to bring her own voice and experience into the classroom. Indeed, many publishers include value-added materials like test banks and pre-made assignments designed to create textbooks that are fully “teacher-proof.”

Students are often caught in the crossfire of a broken textbook market where books are sold by a small group of for-profit publishers who control 80% of the market, and purchasing decisions are made by faculty instructors but students are asked to pick up the bill. This situation — where for-profit publishers leverage faculty incentives to exploit a captive academic market — should sound familiar to anyone working to bring open access to scholarly publishing. The scale, however, is quite different: the textbook market exceeds the scholarly journal market by roughly \$4 billion each year.

As they have with open access, academic stakeholders have begun to rebel, designing open materials that are not just cheaper than closed works but are [positively better](#). These open educational resources (OER’s) may be peer-reviewed Creative Commons-licensed textbooks like those found in Rice University’s [OpenStax](#) program or the University of Minnesota-led [Open Textbook Network](#). They also encompass modular learning objects like those found in the [MERLOT](#) repository or even full courses like those offered through MIT’s [OpenCourseWare](#). [Community colleges](#) and system-wide efforts like [Affordable Learning Georgia](#) have been particularly effective in this space, with programs like Tidewater’s “[Z-Degree](#)” that completely remove student textbook costs from the equation.

In the past several years, academic libraries have [joined the fray](#), raising awareness, offering grants, and collaborating with faculty authors to create a diverse body of open educational resources. In the [NCSU Libraries](#), we have followed the outstanding examples of institutions like [Temple](#) and [UMass-Amherst](#) by [offering grants for faculty members](#) to replace closed, commercial works with open, pedagogically-transformative OERs. These projects create massive efficiencies for libraries — spending a few thousand dollars to save students millions — and a [growing body of empirical data](#) indicates that student learning and retention are improved by open materials.

It’s no surprise that an open textbook would be more effective than one that a third of students can’t afford to buy. The greatest potential for OERs, however, comes from the way they empower instructors and engage with library expertise. The “teacher proof” books offered today frequently reduce instructors to hired hands, reciting homogenized narratives approved by for-profit publishers. In contrast, as [one recent study concluded](#), an OER “puts ownership of curriculum directly back into the hands of teachers, both encouraging them to reflect on how the materials might be redesigned and improved and empowering them to make these improvements directly.” Combined with support from libraries for instructional design, copyright and licensing, and digital competencies, OERs have the potential to transform pedagogy at the deepest levels.

For today's students, textbook prices mean more than just a few extra days of subsisting on ramen noodles. Too often, students have to choose between adding another thousand dollars to an already [historical debt load](#) or trying to get by without essential resources and closed, and commercial textbooks often leave faculty instructors with no choice at all. These, to borrow a phrase, aren't the books we're looking for.



# Copyright MOOCs, new and refreshed

*Wed, 06 Jan 2016 17:51:22, ksmithl2@duke.edu, [category: copyright-in-the-classroom, category: notes, category: fair-use, category: libraries]*

When my colleagues Anne Gilliland and Lisa Macklin and I released our first [Coursera MOOC about copyright, called Copyright for Educators and Librarians](#), we were very pleased with the reaction. Although our enrollment for that first MOOC was, at just over 10,000 participants, rather low by MOOC standards, we had a higher than normal percentage of completions, and the feedback we got from colleagues was quite positive.

That course ran in the summer of 2014. In July of 2015, we were able to release a new version of the same course in an on-demand format, meaning that participants are able to start the course whenever they wish and can proceed at their own pace without a proscribed ending point.

The move to on-demand is important because it brought us a bit closer to our overall goal, which has been to provide a form of copyright education that is accessible in the several sense of that word to all of our colleagues in education, especially. The course is still free, although there is a small fee if the participants want to receive a “verified certificate” of completion. We began this project aware that the Center for Intellectual Property at UMUC had recently closed, so the education community had lost access to their series of course offering on copyright that carried continuing education credit. Our hope was to provide an opportunity to learn about copyright that was free to all, but also could be used, through the verified certificates, by those colleagues who want to learn about the subject AND get some form of (less expensive) credit for this professional development activity.

Now we have taken another big step toward that goal, with the [release today of our second MOOC, on Copyright for Multimedia](#). Like the first course, this MOOC is on-demand, free to take, and relatively short — four substantive modules and an introduction. In this second course, the modules focus on four different media — data, images, music and film. It grew out of our awareness how often the questions brought to us focus on different media. Many of our colleagues seem confused about how copyright “rules” from the print world, apply in an environment rich with diverse forms of expression and communication. This confusion is understandable, since copyright was born with print technology and continues to adapt only uncomfortably to these “new” media.

When we are asked about what “copyright for music,” or “copyright for film,” looks like, we try to emphasize that the one copyright law in the U.S. is intended to apply without regard to medium of expression. Nevertheless, it is perfectly true that some provisions of the law are media-specific. More significantly, the circumstances in which different media are used are often quite different from the more familiar facts surrounding the use and distribution of print. There is an lawyer’s maxim that says, “change the facts and you change the outcome,” and that is never more true than when we are talking about different media.

Our new MOOC tries to address these differences, and also to further develop the framework for analyzing a copyright issue that we built in the first course. Now that both MOOCs are available on the Coursera platform, we hope that they will be a continuing resource to improve copyright understanding for our colleagues.

I want to add a couple of personal notes to this announcement of the two-part series of MOOCs on copyright.

First, I want to say what a wonderful experience it has been to work with Lisa and Anne, who are as smart and creative about teaching as they are about copyright, as well as with the online course team at Duke. I want especially to note my sense of awe at the creative, complex and realistic scenarios that Anne Gilliland can think up to tease out the implications of copyright in different situations; I hope our participants find them as thought-provoking and amusing as I do.

Second, because of the [announcement issued today](#) about my new position as Dean of Libraries at the University of Kansas, and thus my departure from Duke, it seems unlikely that I will participate in any more MOOCs in this series. Our original plan was for three courses, but the two we now have stand alone and, we hope, also work together as a series. It is now an open question whether there will be a third MOOC in this series, but the process of creating these two has been delightful, and the product, I profoundly hope, useful to our colleagues and to many others.

# Steal this book?

*Thu, 11 Feb 2016 09:14:09, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: fair-use, category: technologies]*

Last week I was researching a copyright and fair use issue for a faculty member, and needed to see a copy of a book held by Duke's [Rubenstein Rare Book and Manuscript Library](#). As I explained the issue and what material I wanted to use to the Rubenstein staff, a researcher sitting nearby listened intently. As soon as we finished, she told me that she was the President of the Authors Guild and that they were suing Google over fair use. She began to explain to me why Google was wrong, but that the author for whom I was doing the research should be allowed to rely on fair use. When I introduced myself as a lawyer and copyright specialist for the Libraries, the conversation came to a polite but stilted conclusion.

This week, however, I got a chance to see more fully what that researcher, whose name is Roxana Robinson and who was giving a lecture that afternoon in the Library, has to say about Google, in a column she wrote for the Wall Street Journal called "[How Google Stole the Work of Millions of Authors](#)" (behind a paywall). Ms. Robinson, a novelist and biographer, unfortunately proves what I suspected at the time of our encounter, that her perspective on fair use is based on a preconceived idea about who are good users entitled to rely on fair use (authors) and who are bad, unworthy users (Google), rather than on an understanding of the careful legal analysis of specific uses that actually underlies these decisions.

The WSJ column employs some interesting rhetoric, starting with its title, which is clearly intended to provoke a visceral response. Many people have noted that the language of theft and stealing is inappropriate when the issue is copyright infringement. This point is made in great detail in William Patry's book "[Moral Panics and the Copyright Wars](#)." As is true for most crimes, the definition of theft includes an intention, a mental state or "mens rea" that is a required element of that crime. For theft this intention is "to deprive the true owner of [the personal property]" (definition from Black's Law Dictionary, Seventh edition). Because of the nature of intellectual property, copyright infringement never meets this definition; that is why the law has a different word — infringement — for the unauthorized taking of someone else's IP.

So the headline of Ms. Robinson's column is legally incorrect and intended, I think, to stir up her base rather than to make an argument that could sway the Supreme Court (for more on this point, see the rebuttal published in Fortune "[Why the Authors Guild is Still Wrong about Google's Book Scanning](#)").

The column also makes a couple of sardonic remarks about quotes that can be found using Google Books. Here the argument breaks down pretty badly, because both of the quotes Ms. Robinson chooses, one from Shakespeare and one from Emerson, are in the public domain. Her effort to be ironic seriously backfires here, because her own column is actually proving the utility of the Google Books database in a way that emphasizes its lawful use of PD texts. Rhetoric has truly overcome logic.

It is worthwhile, nevertheless, to think a minute about the logic structure of the argument that what Google has done is infringement. Ms. Robinson makes the point that there are many books that were scanned by Google, that Google is a profitable company, and that no authorization for the scanning was asked for or given by the authors of the works that were scanned. All of this is true, of course, but it does not amount to an argument that Google has infringed any copyrights. What is missing, at least as I see it, is any notice that the authors have been harmed. The rhetoric of the column clearly tells us that

the Authors Guild, and at least some individual authors who are involved in the lawsuit, are angry. But it does not explain a fundamental element of any tort action — harm.

The two courts that have considered this case both found that there was no harm done here — no negative impact on the market for or value of the works in question, to use the language that is part of a fair use analysis. Users cannot obtain any significant portions of books that are limited to snippet views; the AG's own experts were unable to retrieve as much as 16% of any work using word searches and snippet results, and even that amount of text was randomized in a way that made reading a coherent piece of the work impossible. There is just no evidence that any sales are lost due to this finding aid, and it is quite possible that sales will be gained.

There is, of course, the question of a licensing market. But that is almost a silly question. A market for licensing scans to create an index has never existed, and it is impossible to imagine that any of the authors had such an idea in mind when they wrote their works. As Judge Leval said in his decision for the Second Circuit Court of Appeals, this is not really even a use of the work, it is a use of information about the work, for which a secondary licensing market simply is not appropriate. Creating such a market would be revolutionary, and it would do much more harm to the overall environment for books and reading than anything Google could think up. What the Authors Guild seems to be saying here is that Google should pay us for something we never thought we would or should get paid for, simply because they have a lot of money. Perhaps when we recognize how weak that argument actually is it becomes understandable that Ms. Robinson relied on overheated rhetoric rather than legal or logical arguments. But if the purpose of her essay is to convince people that the Supreme Court needs to take the case to right a serious wrong, it falls far short, and is unlikely to convince the nine citizens whose opinion on that issue matters the most.

# Backing into the public domain

*Wed, 17 Feb 2016 13:04:13, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: orphan-works, category: public-domain]*

The [last time I wrote](#) about the lawsuit and subsequent ruling over the copyright status of “Happy Birthday To You,” I was trying to clarify that, in spite of media reports, the court had not declared “Happy Birthday” to be in the public domain; it merely said that Warner Chappell music was not able to demonstrate that they held the rights in the song. In effect, the court ruling turned “Happy Birthday” into one of the very few judicially-recognized orphan works.

I was a little startled, therefore, to see [headlines last week](#) saying that a [settlement in the case](#) was asking the judge to declare “Happy Birthday” to really be in the public domain. My first reaction was to wonder if a court can actually do that. Public domain status is not actually defined anywhere in the law; it is, rather, an absence of copyright protection. So the question that popped into my head was, if there is not sufficient evidence to determine whether or not there is copyright protection for the song, can a court just declare that any putative protection that might exist is simply void? Can the court do a kind of quitclaim on copyright for a particular work?

A little more attention to the issue reminded me that this is not, in fact, what is happening (there is another story about the settlement, with a less dramatic headline, [from the New York Times, here](#)). In fact, the Judge is being asked to approve a settlement document in which several of the parties in the case explicitly deny that the song is in the public domain, but agree to release any claims they may have. They go on to state that they know of no other claimants who could assert ownership, so they believe that, with the release made by the settlement (assuming it is approved), “Happy Birthday To You” will be in the public domain. So the “quitclaim” here is from the parties, as logic suggests it must be (see sections 2.2.1 and 2.2.2 in the settlement document linked above). But these portions of the settlement also contain a promise that the parties will not object to a declaratory judgment from the court, sought by the plaintiffs, that the song will be in the public domain as of the final settlement date.

In a conversation about this, some friends and I joked that we had found a new solution to the orphan works problem — just ask courts for declaratory judgments that no copyrights continue to exist in such works. A court would not do that, of course, without at least having all the known possible claimants before it and willing to relinquish their claims. And it is a risky strategy for any court, because in theory an unknown claimant could arise at a later date, and it is not clear what effect such a declaratory judgment might have on their rights, if they had evidence that supported their claim. That is unlikely in most cases, and extremely unlikely in the “Happy Birthday” case, where all the potential claimants seem to be at the table. Nevertheless, this result in a particular situation does not really offer a positive way forward for most orphan works.

If declaratory judgments are a poor way to address most orphan works because they attempt to adjudicate the rights of unknown parties who do not have a voice, the same might be said of the Copyright Office’s extended collective licensing scheme, which seeks to collect money on behalf of those unknown rights holders. Such a plan would create a situation not unlike that which prevailed for years around “Happy Birthday” — users paying the wrong party for the right to use a work for which the real rights holder is unknown.

It seems clear to me that the best solution to the orphan works problem in many situations, including mass digitization of distinct and distinctive collections by libraries, is fair use. The HathiTrust and Google

Books cases pointed us in that direction in a way that this lawsuit over “Happy Birthday” cannot. Nevertheless, that case does serve as a reminder, at least to me, of the variety of resources that courts have at their disposal that might address an orphan works situation. Several common law doctrines used to preserve equity in property disputes come to mind — the doctrine of abandonment, for example, or even adverse possession. Perhaps most useful would be laches, a common law doctrine that tells courts that they can refuse to hear a claim (usually in equity, whereas copyright claims are claims in law) if the party asserting its rights has “slept on” those rights, which is to say has unreasonably delayed or been negligent in enforcing them.

Courts have a great deal of space to deal creatively with disputes, which is one of the best things about our common law system. Various doctrines have evolved over time that could help courts preserve fairness in a dispute over some use of an orphan work, presuming that a claimant comes forward at some point. But the truth is that none of these fall-back positions are really needed in most cases because Congress gave us a statutory solution for this issue, although it is rooted in common law itself — fair use.

# Prognosticating about the new LoC

*Mon, 29 Feb 2016 10:55:43, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: libraries]*

It is safe to say that President Obama's [nomination of Dr. Carla Hayden to be the next Librarian of Congress](#) drew rave reviews from the library community. Most Librarians of Congress have been researchers and academics rather than professional librarians. That tradition has worked well over the years, but times are changing quickly for libraries these days. The technical, planning and business skills that come from years of daily service in a large library system, which Dr. Hayden has, seem more important than ever now. Indeed, some of the problems the Library currently has could be attributed to neglect of the technical side of library work by the current Librarian, who clearly stayed in place too long.

So it is not a surprise that [library organizations were quick to praise](#) the nomination of Dr. Hayden, who is currently CEO of the Enoch Pratt Free Library in Baltimore. As Inside Higher Ed tells us, Dr. Hayden is credited with improving the finances at Enoch Pratt and with new technological initiatives. Just what the LoC needs.

It is also interesting to see that open access advocates have been equally pleased with this nomination. Public Knowledge, for example, issued [this statement welcoming the nomination](#). The reaction from writer, blogger and open access advocate Cory Doctorow was a little less restrained, referring to Dr. Hayden as "[a rip-snortin', copyfightin', surveillance-hatin' no-foolin' LIBRARIAN.](#)" And TechDirt notes that the President explicitly mentioned open access in his statement about Dr. Hayden. As a reason for nominating a candidate for Librarian of Congress, support for open access is as unprecedented as is Dr. Hayden's gender or ethnic background.

All this begs the question of what the chances are that Dr. Hayden will be confirmed. Of course, she might encounter difficulties just because of the general dysfunction in Congress or because of a desire to obstruct anything the President thinks is a good idea. Carla Hayden's nomination may just be collateral damage in the ongoing conflict between the White House and Capitol Hill. But let's assume for a minute that the nomination does move through the process in Congress — it would be very unusual to see a fight over a Librarian of Congress, after all — and consider the possibilities.

One consideration would be the attitude of the groups that lobby on behalf of Big Content. The RIAA issued [this statement in support\(?\) of the nomination](#), which certainly seems to damn with faint praise. In fact, Cory Doctorow reads this statement as evidence that the RIAA is afraid of Dr. Hayden. Could it be that she might push the Copyright Office a little bit out of the embrace with Big Content that it has enjoyed in recent years?

This possibility points us to the real drama of the nomination, in my opinion (if drama is not too, well, dramatic a word to use). The issue, anyway, is the effect that Dr. Hayden's nomination might have on the efforts to move the Copyright Office out of the Library of Congress. The reasons given for this effort, which I wrote about [here](#) and [here](#), seem twofold. The first is the fact that the LoC technical infrastructure has become out of date. As I said in the earlier post, that is something we might expect a new Librarian to address, and it seems certain that Dr. Hayden would be well-placed to make those improvements. So if that is the concern, it seems that her appointment should slow the momentum to make the CO an independent agency, or to move it to the Department of Commerce.

But statements regarding the idea of moving the CO also make some veiled references to a conflict of mission between the Copyright Office and libraries. This can only refer to that trend toward the CO becoming a lobbying arm of the content industries, and that conflict — it is shameful, in my opinion, to admit publicly that the Copyright Office is not first and foremost dedicated to the public interest, as are libraries — is only likely to get worse with the nomination of Dr. Hayden. So if we see foot-dragging and an unwillingness to act on this nomination, I think there will be more behind that inaction than just generic reluctance to accept this President's nominations. I think we will be seeing the quiet but firm opposition of the lobbyists from Big Content, who may be hard-pressed to oppose Dr. Hayden openly but will very likely want to sabotage the nomination in order to preserve their regulatory stranglehold over the Copyright Office.



# Some radical thoughts about Sci-Hub

Thu, 03 Mar 2016 05:48:17, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: open-access-and-institutional-repositories, category: scholarly-publishing]

Radical, as I like to remind folks, means to get to the root of an issue (same derivation as radish). So when I say I am offering some radical thoughts about Sci-Hub and the controversy it has generated, I mean that I hope to use the discussion to ask some very basic, “at the roots,” questions about copyright, not that I intend to shock anyone.

My radical thoughts have been prompted by the many very conventional reactions to [stories about Sci-Hub](#), which collects academic papers using .edu proxies and makes them available without charge and in disregard of the rules imposed on distribution by the copyright holders. These reactions have followed two predictable trajectories, with one group calling what the site and its founder Alexandra Elbakyan are doing civil disobedience. Indeed, Ms. Elbakyan herself has apparently cited [Article 27 of the U.N. Declaration on Human Rights as a justification of her project](#), which now host nearly 50 million articles. On the other side of the debate are those who are shocked by this disregard of the law, and especially by the apparent willingness of some libraries or librarians to use Sci-Hub to obtain research materials for their patrons. All this debate, by the way, has been provoked by a [lawsuit against Sci-Hub](#) brought by publishing giant Elsevier, a move which has predictably [increased attention](#) to the site.

One thing that has been particularly disturbing to me about the various statements expressing outrage over Sci-Hub is how focused they are on the values and opportunities of the developed world. One comment I saw pleaded with librarians to respect the law and not to use Sci-Hub “just to save money.” Such moralizing misses a couple of basic points, I think. The first is that Sci-Hub seems directed at, and is certainly mostly used by, researchers and students in the developing world, where it is not merely a matter of “saving some money,” it is a question of finding any way at all to get access to scientific and medical research. We tend to forget that a \$30 paywall, while a mere inconvenience to those of us in the U.S. or Europe, can be an insurmountable roadblock for someone in Cambodia or Malawi who is trying to learn about a medical condition.

Another point about the righteous defense of “the law” in some of these comments is that laws come in different forms and carry different kinds of moral authority. Lawyers distinguish, for example, between illegal acts that are “wrong in themselves” (*malum in se*) and those that are only “wrong because prohibited,” or *malum prohibitum*. (there is a discussion of this distinction, for those with a sense of humor, in the movie *Legally Blonde*). Copyright infringement is, of course, the latter; a violation of the law but not of any moral imperative. Such a law merely enshrines a decision about the distribution of resources, and it can be changed without causing the collapse of human society. Precisely the kind of situation where acts of civil disobedience to provoke discussion and change are most supportable.

This is where the radicalism comes in, when we look at what copyright law does, how it has been used over time, and what Sci-Hub is actually doing. These questions were raised for me by the fascinating comment by Thomas Munro on [this blog post](#), which is itself defending the idea of Sci-Hub as civil disobedience. Dr Munro’s comment, the first that follows the post, points out that Sci-Hub is doing what U.S. publishers did for a long time — she is refusing to recognize copyrights granted by other countries. Dr. Munro writes as follows:

What Elbakyan is doing — ignoring foreign copyright — was official US government policy for more than a century. As a result, books were much cheaper than in Europe

and literacy skyrocketed. When the US finally caved, in 1888, the editors of 'Scientific American' thundered that "The extension of copyright monopoly to foreigners will enable them to draw millions out of the country" and that it would turn US customs officers into "pimps and ferrets for these foreigners".

As one Senator said in voting against the bill: "An international copyright is simply a monopoly ... what is known as protection, or taxing the people to make a few persons rich ... It seems to me that there can be no excuse for carrying this restriction upon human knowledge."

That the publishing industry thrived in the U.S. by ignoring copyright is a well-known but little discussed aspect of our history with scholarly communication. Perhaps those early American publishers did not see themselves as practicing civil disobedience; they may have just been trying to maximize profits. But their willingness to ignore foreign copyrights when it served what they believed was a more important purpose really does call us to the root of the matter. Copyright law is an instrumentality, not a good in itself. It's role in our legal system is to encourage creativity and the production of knowledge. When it ceases to do that it deserves to be challenged and changed.

I believe that copyright has a continuing role to play in the academy and in the reform of scholarly communications. But we do no favors to that role when we treat copyright law as enshrined and inviolable, as if it had been decreed from Mt. Sinai. Instead we should focus on what the law is intended to accomplish, where and why it fails in its purpose, and how we can make it more adaptable for the digital age. One key to a clearer assessment of copyright law is to know its history a little better, and in his blog comment Dr. Munro also offered us a pointer for that task — a citation to a doctoral dissertation, now freely available as an e-book:

Eric Anderson. (2010). Pimps and Ferrets: Copyright and Culture in the United States, 1831-1891.  
<http://archive.org/details/PimpsAndFerretsCopyrightAndCultureInTheUnitedStates1831-1891>

I haven't read Anderson's book yet, but I am anticipating a more detailed and nuanced view of how copyright has been used and abused through the vicissitudes of American history.

# Moving into the open

*Tue, 22 Mar 2016 10:20:16, ksmithl2@duke.edu, [category: copyright-issues-and-legislation, category: libraries, category: open-access-and-institutional-repositories, category: scholarly-publishing]*

Since it was announced that I will move shortly to the University of Kansas, several people have asked me if I intend to continue blogging, and have kindly encouraged me to do so. This blog, of course, will remain one of the communication outlets for the Scholarly Communications program at Duke, and my Duke colleagues Paolo Mangiafico and Haley Walton, as well as others, will fill the space, I am sure, with interesting and worthwhile reads.

I do intend to keep blogging, however, at a different site and in a different format. Over the past few weeks, some colleagues and I have assembled a great group of people interested in scholarship, publishing and libraries, and I am excited to announce a new, collective blog called [IO: In the Open](#).

On this new site, this group of people will be writing about how scholarship and scholarly publishing is changing and can change in ways that better adapt to new technologies, needs, and economics:

Amy Buckland  
Institutional Repository Manager, University of Chicago Library

William Cross  
Director, Copyright & Digital Scholarship, North Carolina State University Libraries

Ellen Finnie  
Head, Scholarly Communications & Collection Strategy, MIT Libraries

Patricia Hswe  
Digital Content Strategist, Penn State University Library

Lisa Macklin  
Director, Scholarly Communications Office, Emory University Library

John Sherer  
Director, University of North Carolina Press

Sarah Shreeves  
Associate Dean for Digital Strategies, University of Miami Libraries

Kevin Smith  
Dean of Libraries, University of Kansas

Claire Stewart  
Associate University Librarian for Research & Learning, University of Minnesota

Shan Sutton  
Vice Dean, University of Arizona Libraries

The title of this new blog should not surprise folks. It is born out of the conviction that scholarship should be open because...

Scholarship in the open is better business — it provides a clearer perspective on what it actually costs to produce articles, books and other scholarly output.

Scholarship in the open is better for libraries — it connects us more directly with our researchers and with the life entire life cycle of research. It improves our ability to disseminate the outcomes of research and get the materials they need into the hands of students, teachers and others quickly and efficiently.

Scholarship in the open pushes us towards better copyright laws — it encourages us to think about how copyright could better align with author incentives and reminds us that, because the reasons creators create are so various, the law needs more flexibility than it currently has.

Scholarship in the open is better scholarship — it can be read and evaluated by a much larger and more varied audience. It takes the initial process of evaluating works of scholarship out of the hands of a small elite, some of whom are ill-prepared for the task, and offers the potential for more diverse ways of measuring impact and providing more complete information for the hiring, tenure and promotion process.

Our first blog post at IO: In the Open, by Ellen Finnie of MIT, will focus on the vital issue of how we spend our money in libraries, and how we can think in broader terms about the value of scholarly resources. Ellen's post, with its interesting analogy to food-supply chains, will be published on IO within the next day or so.

I hope that the people who have followed Scholarly Communications @ Duke so faithfully over the years will also subscribe to IO: In the Open. We believe you will find a interesting, committed and diverse set of voices there that will help shape the discussion of these issues in years to come.

If you follow this blog on Twitter (Twitter handle @klsmith4906), that account will also tweet out new post from IO: In the Open. Or, you can follow our new IO Twitter account: <https://twitter.com/IOIntheOpen>. You can also subscribe directly to the [IO: In the Open](#) blog posts by using the widget on the side of the IO page.

# Here we go again: latest GSU ruling an odd victory for libraries

*Fri, 01 Apr 2016 09:17:55, ksmith12@duke.edu, [category: copyright-in-the-classroom, category: copyright-issues-and-legislation, category: fair-use, category: scholarly-publishing]*

My first thought when I read the [new ruling in the Georgia State copyright lawsuit](#) brought by publishers over e-reserves was of one of those informal rules that all law students learn — don't tick off your judge. From the first days of the original trial, the arrogant antics of the attorneys representing the publisher plaintiffs — Oxford University Press, Cambridge University Press, and Sage Publishing — clearly put them in a bad light in the Judge Evans' eyes. Those chickens came home to roost in this latest opinion, especially where the plaintiffs are chided for having filed a declaration about what licenses were available for excerpts back in 2009, even after the Judge told them not to, since that information had not been introduced as evidence in the original trial. All of that evidence was stricken, and the Judge based her new opinion on the evidence that was before her in that first trial. I can imagine that the publishers might use that ruling as a basis for yet another appeal, but if they do so, they had better be able to prove that the evidence is genuine and reliable, and to explain why, if it is, they did not produce it at trial back in 2011.

But I have put the cart before the horse; let's look at the ruling we just received from the District Court. In case some have lost track, this case was originally decided by a 2012 ruling by Judge Evans that found infringement in only five of 74 challenged excerpts, and awarded court costs and attorney's fees to GSU as the "prevailing party" in the case. The publishers appealed that decision to the Eleventh Circuit Court of Appeals, which vacated the trial court holding in 2014, sending the case back to Judge Evans with a set of instructions on how to improve the fair use analysis for these challenged excerpts. As has been noted many times before, the publishers lost nearly all of the big principles they had wanted to establish in the case; the Court of Appeals refuted most of the publishers' arguments even as it did what they asked and vacated the first ruling.

Now, using the new fair use analysis directed by the Court of Appeals, Judge Evans has handed the publishers yet another loss. One wonders how many times they will have to lose this case before they finally learn something about the state of copyright law today. Still, this loss for the publishers is only the oddest sort of victory for libraries.

The new fair use analysis that Judge Evans uses is carefully designed for situations where the challenged use is not transformative; the non-transformative nature of the use means that the small portions used must be scrutinized very carefully, and it means that the fourth factor — the potential impact of the use on the market for or value of the original — gets extra weight. It is very important to notice this fact, because it means that this analysis used by Judge Evans will not be applicable in many other situations, especially in academia, where the uses are, unlike with e-reserves, transformative.

Even though both the trial court and the Court of Appeals have held that e-reserves are not transformative, both courts have affirmed that the first fair use factor — the purpose and character of the use — will still favor fair use when that purpose is non-profit and educational. So throughout this new decision, Judge Evans continues to hold that the first factor always favors fair use.

The analysis of the other factors has changed, however. For factor two, the nature of the original, Judge Evans does not make a blanket assumption, owing to instructions from the Eleventh Circuit, but looks at

the nature of each excerpt. In most cases, she finds that informational matter is mixed with more individualized scholarly commentary, and the result is that this factor is usually neutral — neither favoring nor disfavoring fair use. In the few cases where it counts against fair use, it has little impact (the Judge says this factor is only 5% of each decision).

In the same way, factor three now gets a more careful and specific analysis. The 10% or one chapter rule that Judge Evans used in her first opinion is gone, at the instruction of the Court of Appeals. Instead, Judge Evans looks at each excerpt and evaluates its appropriateness to the allowable purpose (from factor one) and its potential to substitute for a purchase of the book (market substitution, anticipating factor four). In many cases, she finds that the excerpts are a very small number of pages and a small percentage of the entire work (so not a market substitute), are also narrowly tailored to accomplish a specific teaching objective. In those cases, this factor will favor fair use.

Factor four, which the Judge now believes should constitute 40% of the fair use decision *in this particular situation*, is where most of the action is in this ruling. The analysis, the Judge says, is two-fold, looking at both harm to the potential market for the original and harm to the value of the work, which means looking at the importance of the licensing market. About this latter source of potential value, the Judge says that she must decide “how much this particular revenue source contributed to the value of the copyright in the work, noting that where there is no significant demand for excerpts, the likelihood of repetitive unpaid use is diminished” (p. 9). The result of this inquiry is that a lot of financial information about each book — its sales over time and the amount of revenue derived from the permissions market — is very important in the fourth factor analysis. The charts for many of the books that reflect this information make for fascinating reading, and contain information I suspect the publishers would rather not have made public. This is where it becomes most difficult for libraries to apply the analysis that Judge Evans is using, because the Court has access to information, and time to analyze it, that is not available to libraries as they consider e-reserve requests. Still, I think it is important to note that the standard the Judge is using in this evaluation is pretty high and it is focused on value to the authors and to users:

[W]e must determine how much of that value (the value of the work to its author and the potential buyers) the implied licensee-fair users can capture before the value of the remaining market is so diminished that it no longer makes economic sense for the author — or a subsequent holder of the copyright — to propagate the work in the first place (page 8, quoting the 11th Circuit).

In other words, this analysis is opening up a significant space in the idea of market harm, which permits potential fair users to diminish the value of the work in question to some degree, as long as that reduction in value is not so steep as to discourage writing and publishing these academic books. Licensing, in this analysis, is the remedy only for that kind of steep loss of value; it is not a mere right of the copyright holder to obtain all the value from the work that is possible.

Judge Evans applied this complex formula for fair use to 48 challenged excerpts. It was only 48 because for 26 of the ones discussed in her original ruling she found that there had been no *prima facie* case for copyright infringement made out, either because the publishers could not show they held the copyright or because there was no evidence that any students had used the excerpt. This part of the ruling was not challenged, so only these 48 fair use rulings had to be redone. Bottom line is that she found **fair use for 41 of the 48**, and infringement only in seven cases. As Brandon Butler points out in [his discussion of the ruling](#), even that might overestimate the infringement, since it appears that the summary in the

decision may list at least some instances of infringement that were actually found, in the specific analysis, to be fair use.

So this ruling, like each ruling in the case, is clearly a disaster for the plaintiff publishers. Once again it establishes that there is significant space for fair use in higher education, even when that use is not transformative. Nevertheless, it is a difficult victory for libraries, in the sense that the analysis it uses is not one we can replicate; we simply do not have access to the extensive data about revenue, of which Judge Evans makes such complex use. So what can libraries do, now that we have this additional “guidance” about e-reserves from the courts? I think there are two fundamental takeaways.

First, we should continue to do what we have been doing — making careful fair use decisions and relying on those decisions when we feel the use is fair. While we do not have much of the information used by the Court in this latest ruling, we still do have the security provided by [section 504 \(c\)3 of the copyright law](#), which tells us that if we make good faith fair use decisions we, as employees of non-profit educational institutions or libraries, are not subject to statutory damages. This greatly lowers our risk, and adds to the disincentive to sue academic libraries that must surely stem from the GSU experience. All we can do, then, is to continue to think carefully about each instance of fair use, and make responsible decisions. We still have some rules of thumb, and also some places where we will need to think in a more granular way. But nothing in these rulings need fundamentally upset good, responsible library practice.

The second takeaway from this decision is that we should resort to paying for licenses only very rarely, and when there is no other alternative. The simple fact is that the nature of the analysis that the Court of Appeals pushed Judge Evans into is such that licensing income for the publishers narrows the scope for fair use by libraries. To my mind, this means that whenever we are faced with an e-reserves request that may not fall easily into fair use, we should look at ways to improve the fair use situation before we decide to license the excerpt. Can we link to an already licensed version? Can we shorten the excerpt? Buying a separate license should be a last resort. Doing extensive business with the Copyright Clearance Center, including purchase of their blanket campus license, is not, in my opinion, a way to buy reassurance and security; instead, it increases the risk that our space for fair use will shrink over time.

[personal note — this will certainly be my last word here at the Scholarly Communications @ Duke site, and it is fitting that it deal with the Georgia State case, about which this site has seen so much commentary. For the sake of continuing this conversation and including more discussants, I am also going to post this piece on the new group blog of which I am a part, [IO: In the Open](#). Apologies if the repetition is annoying to anyone.]